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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN LILBURN,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

PETITION FOR A WRIT OF CERTIORARI

Eric R. Glitzenstein
(Counsel of Record)
Katherine A. Meyer

Meyer & Glitzenstein
1601 Connecticut Ave., N.W.
Suite 450
Washington, D.C. 20009-1035
(202) 588-5206

Attorneys for Petitioner

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CASILLAS PRESS INC., 1717 K STREET, N.W. WASHINGTON, D.C. 20036

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QUESTION PRESENTED

Did the Montana Supreme Court err in holding that a provision of Montana's "hunter harassment" statute is not content-based, overbroad, or vague in violation of the First Amendment, when the provision proscribes speech that "disturbs" hunters and is conveyed with the "intent to dissuade" them from hunting?

PARTIES TO THE CASE

The sole petitioner here, John Lilburn, seeks review of a decision of the Supreme Court of the State of Montana. Mr. Lilburn was the defendant in the Montana Eighteenth Judicial District and was the respondent in the Montana Supreme Court. The State of Montana was the plaintiff in the Montana District Court and the appellant in the Montana Supreme Court. There were no other parties in the proceedings below. The Montana Shooting Sports Association, Inc., the Western Montana Fish and Game Association, Inc., and Michigan United Conservation Clubs filed a brief as *amici curiae* in the Montana Supreme Court in support of the State of Montana.

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OPINIONS BELOW

The opinion of the Montana Supreme Court, rejecting petitioner's constitutional challenge to the state law at issue and reversing the ruling of the Montana District Court, is reported at 875 P.2d 1036 and appears in the Appendix to this petition ("Pet. App.") at 1a-17a. The unreported ruling of the Montana district court sustaining petitioner's constitutional challenge appears in the Appendix at 18-30a.

JURISDICTION OF THIS COURT

The Montana Supreme Court's ruling was issued on June 9, 1994. On August 23, 1994, Justice O'Connor entered an order extending the time for petitioner to file a petition for

a writ of certiorari to October 7, 1994. By order dated September 19, 1994, Justice O'Connor further extended the time for filing a petition to October 21, 1994. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION AND STATUTE

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." This prohibition has been extended to the states through the Fourteenth Amendment. *See Edwards v. South Carolina*, 372 U.S. 229 (1963).

The Montana "Act to Prohibit Harassment of Hunters and Trappers" was enacted in 1987. Montana Code Annotated § 87-3142(3), which is primarily at issue here, provides in pertinent part:

> **Harassment prohibited.**
>
> . . .
>
> (3) no person may disturb an individual engaged in the lawful taking of an animal with the intent to dissuade the individual or otherwise prevent the taking of the animal.

Section 87-3-141(1) defines "[t]aking" as the:

> pursuit, hunting, trapping, shooting, or killing of a wild animal on land upon which the affected person has the right or privilege to pursue, hunt, trap, shoot, or kill the wild animal.

STATEMENT OF THE CASE

In recent years, the federal government and 48 states have passed some version of so-called "hunter harassment" laws, which are designed to prevent persons who are opposed to sport hunting from "harassing" hunters or otherwise interfering with hunting activities on public lands. As discussed further below, there has been considerable litigation in state and federal courts regarding the constitutional validity of these laws and, more specifically, whether they abridge the freedom of speech guaranteed by the First Amendment.

This case involves the constitutional validity of Montana's prohibition on "hunter harassment." MCA § 87-3-142. In particular, the case centers on a provision of the statute, similar to prohibitions found in several other state laws, which makes it a crime for any person to "*disturb an individual* engaged in the lawful taking of a wild animal with *intent to dissuade the individual* or otherwise prevent the taking of the animal." *Id.* at § 87-3-142(3) (emphasis added). A "[t]aking" is defined by the statute as the "pursuit, hunting, trapping, shooting, or killing of a wild animal," *id.* at § 87-3-141(1), and a "[w]ild animal" means "any game animal, fur-bearing animal, or predatory animal . . .." *Id.* at § 87-3-141(2).

Persons who are convicted of a single violation of this provision may be imprisoned for up to thirty days and persons who are convicted of a second violation may be imprisoned for up to one year. *Id.* at § 87-3-143. In addition, a "court of general jurisdiction may enjoin" any person from "disturb[ing]" hunters with the "intent to dissuade" them from hunting, upon a "showing that such conduct is threatened or that it has occurred on a particular premises in the past and that it is not unreasonable to expect that under similar circumstances it will be repeated." *Id.* at § 87-3-144.

The petitioner here, John Lilburn, was arrested in 1990. At that time, Mr. Lilburn and other individuals were protesting, on the Gallatin National Forest in Montana, a "controversial bison hunt" operated by the Montana Department of Fish, Wildlife & Parks ("DFWP"). 19a. The bison hunt was the subject of national controversy because the "last remaining wild herd of 2400 bison exists in Yellowstone National Park." *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 144 (D.D.C. 1993). While in Yellowstone, the animals were protected from sport hunting, but, "[i]n recent years, some bison have migrated during the winter to areas in Montana outside the Park." *Id.* When they wandered out of Yellowstone onto adjoining public lands, the animals were shot by hunters.

In March 1990, Mr. Lilburn, along with a number of other persons, protested the sport killing of bison that had left Yellowstone. 19a, 28a. Mr. Lilburn stood between one of the hunters and the bison and stated "Don't shoot!" 20a. He was subsequently arrested and charged with violating MCA § 87-3-142(3) and, following a jury trial, he was convicted. Although "over 40 people were present at the bison hunt, at least 11 of whom were actively opposing it," Mr. Lilburn was the only one who was arrested or convicted under this statute. 27a.

Mr. Lilburn appealed his conviction to the District Court for the Eighteenth Judicial District in Gallatin County, Montana, arguing that the statute violates the First Amendment because it is content-based, overbroad, and vague. The District Court agreed and dismissed Mr. Lilburn's conviction on the grounds that the provision under which he was charged "impermissibly infringes upon the defendant's constitutionally protected rights of free speech . . .." 18-19a. The District Court reasoned that:

> According to *The American Heritage Dictionary* (1982), "dissuade" is "[t]o discourage from a pur-

> pose or course of action by persuasion." "Persuade" is "[t]o cause someone to do something by means of argument, reasoning, or entreaty." Clearly, the statute prohibits not only physical interference with the legitimate taking of a wild animal . . . ***but the statute goes much further and prohibits verbal, written or symbolic speech and expression which dissuades the hunter from taking the prey. Simply stated, the Act punishes communication which has as its purpose inducing others not to hunt.***

23a (emphasis added).

Following a review of the legislative history, the District Court further explained that the provision is "directed solely at the anti-hunting point of view" and is

> ***obviously content-based.*** It prohibits communication with hunters which is intended to dissuade them from hunting, while allowing communication with hunters which ***encourages*** hunting, even if such communication prevents a hunter from taking the prey. For example, if a bystander exclaims, "There he is! Shoot! Shoot!" and the commotion causes the hunter to miss his shot, the bystander cannot be prosecuted. However, if the same bystander said "There he is! Don't shoot! Don't Shoot!," the speaker could be prosecuted.

23a (emphasis added).

Having determined that the statute is "content-based rather than content-neutral" the District Court considered whether the provision "serves a compelling government interest and is narrowly drawn to achieve that end." 24a, ***citing Boos v. Barry***, 485 U.S. 312, 321 (1988) and ***Frisby v. Schultz***, 487 U.S. 474., 481 (1988). The District Court concluded that the

statute could not satisfy this stringent standard because the statutory language is overbroad in the extreme and, indeed, "encompasses all verbal and expressive conduct which has the intention to dissuade from hunting." 26a. In particular, "[c]onduct such as [] prayer vigils at trailheads, the singing of protest songs or the burning of hunting maps, if done with the intent to dissuade a hunter, would be violations of the statute." *Id.* Finally, the District Court

> note[d] that the state has at its disposal alternative means of keeping the peace, the most obvious of which is the charge of misdemeanor assault, with which one of the protestors [at the bison hunt] was charged. Section 45-5-201(1)(c), MCA, provides for prosecution of a person who 'purposely or knowingly makes physical contact of an insulting or provoking nature with any individual.' Criminal mischief, section 45-6-101(1), MCA, may be charged where an individual tampers with another's property so as to interfere with its use. Thus, *the state has other, less constitutionally burdensome avenues of enforcing the public order than to criminalize dissident points of view.*

28a (emphasis added).

In its appeal to the Montana Supreme Court, the state flatly conceded that "there may be instances in which expressive conduct, or even pure speech, violates the statute." Brief of Appellant, at 17, *State of Montana v. Lilburn*, No. 93-404 ("State Br."). Indeed, the state admitted that even if Mr. Lilburn

> had simply walked up to Slemmer [the hunter] as he took aim and ***engaged him in conversation*** with the intent to distract him so he could not make the shot, ***Lilburn would still have been in violation of***

> *the statute*. He would have disturbed Slemmer in the course of the taking of a wild animal through conduct, in this case speech, with the intent to dissuade or prevent Slemmer from taking the animal.

Id. at 17-18 (emphasis added).

However, the state argued that this prohibition on "pure speech" is constitutionally permissible because the provision at issue

> *regulates expression only in the context of sport hunting, and only when the expression is uttered in the field with the intent to prevent the killing of a wild animal*. It reaches no other expression. Thus, Lilburn could have expressed his views on television, radio, in the newspapers, going door-to-door, or on any street corner or in any city park in Montana without violating the statute.

Id. at 28 (emphasis added). In other words, while admitting that the provision as written *does* prohibit even "pure speech" on state and private lands where sport hunting *is* actually being carried out, the state argued that this prohibition is constitutional because persons opposed to hunting remain free to express their opposition in locations where hunting is *not* occurring.

The Montana Supreme Court accepted this position and reversed the District Court's ruling. The Court rejected petitioner's argument that the statute is overbroad on the ground that:

> the statute's proscriptions reach only activities which occur in the field during an otherwise lawful hunt. While the disturbance which is prohibited may, under

> other circumstances, result from a verbal utterance, it makes no difference what the content of the verbal utterance is. The language of the statute does not support the assertion that the statute is aimed primarily at pure speech and expressive conduct conveying only an anti-hunting sentiment.

11a.

The Court also disagreed with the argument that the "Legislature's use of the term 'dissuade' . . . renders this a content-based regulation" because, according to the Court, the "existence of a content-neutral motivation is all that is required under *Ward* and *Renton* to refute the characterization that the statute impermissibly regulates speech or conduct based on the message conveyed." 14a (emphasis added), *citing Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Therefore, because the Court found that the Legislature had a legitimate, content-neutral interest in avoiding "confrontations between hunters and opponents of sport hunting, particularly with respect to the controversial bison hunts," 12a, the Court concluded that the statute could be sustained against a facial challenge even though "there may be instances where protected expression or pure speech may violate the statute." 14a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A SPLIT IN THE LOWER COURTS REGARDING THE COMPATIBILITY OF "HUNTER HARASSMENT" LAWS WITH THE EXERCISE OF FIRST AMENDMENT RIGHTS.

As noted above, the overwhelming majority of states have enacted "hunter harassment" laws and, just several months

ago, Congress passed, as part of its 1994 omnibus crime bill, the first such federal legislation. Although some of these statutes are far more narrowly drawn and carefully crafted than others, all are designed to avoid confrontations between hunters and those opposed to sport hunting on ethical, conservation, or other grounds.[1]

Several states have enacted provisions which are identical or extremely similar to the one at issue here. Thus, three states — Illinois, Louisiana, and Tennessee — specifically make it unlawful to "disturb" a hunter with the "intent to dissuade . . . ."[2] Other states have used slightly different formulations.[3]

---

[1]For example, the recently enacted federal provision, which is subtitled the "Recreational Hunting Safety and Preservtion Act of 1994" is more narrowly drawn than many state laws, including the Montana statute at issue. The federal provisions makes it a violation — punishable by a penalty of $5,000 or more — for any persons "intentionally to engage in any physical conduct that significantly hinders a lawful hunt" on various federal lands, including national forests and federal wildlife refuges. Pub. L. 103-322 § 320802. In a further effort to avoid constitutional infirmity, Congress expressly defined the term "conduct" as "*not* includ[ing] speech protected by the first article of amendment to the Constituton," *id.* at § 320909(9) (emphasis added), and it further provided that "[n]othing in this subtitle shall be construed to impair a right guaranteed to a person under the first article of amendment to the Constitution . . . " *Id.*

[2]The Illinois Hunter Interference Prohibition Act and the Tennessee Hunter Protection Act contain provisions which are functionally identical to Montana's prohibition. *See* 720 Ill. Code at § 125/2(c); Tenn. Code at § 70-4-302(3). Louisiana's "prohibit[ion] on "harassement of hunters, trappers, and fishermen" provides, in pertinent part, that it is illegal for any person to "[d]isturb any hunter, trapper, or fisherman who is engaged in the lawful taking of a wild animal or who is engaged in the process of taking, with intent to dissuade or otherwise prevent the taking, or to prevent such person's enjoyment of the outdoors." La. Rev. Stat. at §56:648.1(3).

[3]For example, Minnesota's prohibition on "hunter, trapper, and angler harassment" provides that a person

> who has the intent to prevent, disrupt, or dissuade the taking of a wild animal or enjoyment of the out-of-doors may not

There has been considerable litigation in state courts and the lower federal courts regarding the constitutionality of hunter harassment statutes. The courts have split over the constitutionality of these provisions. Thus, the Second Circuit, adopting an approach that was virtually identical to that of the Montana District Court, upheld a facial challenge to a Connecticut statute which provided, in part, that " 'n]o person shall . . . *harass* another person who is engaged in the lawful taking of wildlife or *acts in preparation* for such taking.' " *Dorman v. Satti*, 862 F.2d 432, 433 (2d Cir. 1988) (emphasis in original), *quoting* Conn. Gen. Stat. § 53a-183a. Relying heavily on this Court's ruling in *City of Houston v. Hill*, 482 U.S. 451 (1987), the Second Circuit reasoned that this prohibition "'deals not with core criminal conduct, but with speech,'" and impermissibly "'criminalizes a substantial amount of constitutionally protected speech.'" 862 F.2d at 437, *quoting City of Houston v. Hill, supra*, 482 U.S. at 460, 466.

The Second Circuit further explained that, although the law at issue there "*'appear[ed]* to be content-neutral . . . it clearly is designed to protect hunters from conduct — whether verbal or otherwise — by those opposed to hunting." 862 F.2d at 437 (emphasis added), *citing Renton, supra*. The Court further found that "[o]f course, to the extent that the Hunter Harassment Act can be considered content-based, it cannot withstand strict scrutiny" because, among other reasons, "[t]here is no showing that protecting hunters from harassment constitutes a compelling state interest." *Id.* Thus, the

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disturb or interfere with another person who is lawfully taking a wild animal or preparing to take a wild animal.

Minn. Code at § 97A.037. Other state laws are cited in Comment, *The Right to Arm Bears; Activists' Protests Against Hunting*, 45 Mia. L. Rev. 1109, 1111 n. 13 (1991). According to a recent survey, "[m]ost of the hunter harassment laws are based on legislation drafted by the Wildlife Legislation Fund of America, a pro-hunting lobby based in Washington, D.C." *Id.* at n. 14.

Second Circuit concluded that a facially neutral statute was in fact an effort to suppress the views of those opposed to hunting whereas, here, the Montana Supreme Court found that a prohibition which, on its face, criminalizes actions and speech motivated by the "intent to dissuade" hunters is not content-based.[4]

In another recent ruling — decided the day after the Montana Supreme Court decision — the Idaho Supreme Court invalidated a provision of that state's hunter harassment law, which made it a misdemeanor for any person to "'[e]nter or remain in any area where any animal may be taken with the *intent to interfere* with the lawful taking or pursuit of wildlife . . . .'" *State of Idaho v. Casey*, 876 P.2d 138, 140 (Idaho 1994) (emphasis added). The Court rejected the argument that this provision was a "content-based regulation of speech," finding that it "does not, on its face, regulate speech or certain types of speech." *Id.* at 140.

However, relying on *City of Houston v. Hill, supra*, the Court nevertheless concluded that the provision is "unconstitutionally overbroad" because it reaches a "substantial amount of constitutionally protected conduct." *Id.* The Court reasoned that:

> [t]he subsection does not require physical intereference and it is not limited to prohibiting

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[4]Following the Second Circuit's decision, the Connecticut legislature narrowed the scope of its hunter harassment law by eliminating its application to "'harassment" of persons engaged in "acts in preparation" of hunting. In response to a challenge to a criminal conviction, the Connecticut Supreme Court determined that the amended law was content neutral, but remanded the case to the trial court for an "evidentiary hearing to determine the nature and extent of the public interest" served by the statute. *State v. Ball*, 226 Conn. 265, 627 A.2d 892, 899 (1993).

> unprotected speech, such as fighting words or obscenity . . . Thus, a substantial amount of protected speech could be affected — and chilled — by the statute, and there is a realistic danger that the statute could significantly compromise recognized First Amendment rights. For example, ***someone might enter an area where wildlife could be legally hunted and do nothing more than announce his opposition to hunting and his intention to interfere with such taking.***

Id. (emphasis added). In short, both the Second Circuit and the Idaho Supreme Court have struck down hunter harassment provisions which, if anything, are less explicitly viewpoint-based than the statute upheld by the Montana Supreme Court here.[5]

In light of this split in the lower courts on an important issue of First Amendment law, review by this Court is appropriate.

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[5]In an advisory opinion, the New Hampshire Supreme Court also concluded that a proposed hunter harassment bill which is similar to the Montana statute would violate the state constitutional guarantee of free speech. The Court (including then state Supreme Court Justice Souter) explained that:

> ***[t]he bill at issue here is not a valid time, place, or manner regulation because it discriminates among points of view.*** For example, the second section of the proposed statute would prohibit anti-hunting advocates from verbally "provok[ing]" hunters with ***intent to dissuade them from taking animals.*** However, the bill could be read broadly enough to prohibit conservationists from addressing pro-conservation statements to those same hunters on public lands. ***Such comprehensive content-based restrictions are not permissible under the State Constitution.***

Opinion of the Justices, 509 A.2d 749, 752 (N.H. 1986) (emphasis added).

Such review would be of tremendous value to both federal and state courts, which will, without doubt, increasingly be called on to grapple with the application of a plethora of hunter harassment provisions to a variety of protests and demonstrations against sport hunting activities on both state and federal lands.[6]

II. THE MONTANA SUPREME COURT'S RULING RAISES IMPORTANT FIRST AMENDMENT QUESTIONS THAT WARRANT REVIEW BY THIS COURT.

A. The Montana Supreme Court's Ruling That The Provision is Content-Neutral Warrants Review.

Review is also appropriate here because the Montana Supreme Court's ruling will curtail even pure speech that is opposed to sport hunting, and thus the ruling raises important First Amendment questions. To begin with, the Court's holding that the provision at issue is content-neutral — even though it is *expressly* directed at actions taken and statements made with the "intent to *dissuade*" the listener from hunting — stands established First Amendment jurisprudence on its head.

As noted above, the Montana Supreme Court arrived at its conclusion by finding, based on a review of the legislative history of the statute, that the "motivation for adoption of this statute is unrelated to the suppression of speech based on content," 12a, and that the "existence of a content-neutral motivation for the statute is all that is required under *Ward*

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[6]*See* Comment, *supra* n. 3 at 1115-6 (reviewing the background of protests against sport hunting and explaining that "[m]ore recently, anti-hunting activists have organized demonstrations to communicate their message to hunters as well as the public").

and *Renton* . . . ." 14a. But that approach flies in the face of the basic principle, affirmed by this Court last term, that the "mere assertion of a content-neutral purpose" will not be "enough to save a law which, on its face, discriminates based on content." *Turner Broadcasting System Inc. v. Federal Communications Commission*, 512 U.S. ____, 114 S. Ct. 2445, 2459 (1994), *citing Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 231-32 (1987) and *Carey v. Brown*, 447 U.S. 455, 464-69 (1980).

There is no discernible reason — and the Montana Supreme Court offered none — as to why the statute at issue does not come within the "general rule" that "laws that *by their terms* distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." *Turner Broadcasting System, supra*, 512 U.S. at ____, 114 S. Ct. at 2459 (emphasis added); *see also Burson v. Freeman*, 504 U.S. ____, 112 S. Ct. 1846, 1851 (1992) ("As a facially content-based restriction on political speech in a public forum, § 2-7-111(b) must be subjected to exacting scrutiny."); *Boos v. Barry, supra*, 485 U.S. at 318-319 (whether municipal ordinance permits individuals to "picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not").

Indeed, MCA § 87-3-142 focuses on one particular form of "disfavored speech" — *i.e.*, that opposed to hunting — and it expressly singles out for criminal penalty speech and conduct undertaken "with the intent to dissuade the individual" who is engaged in sport hunting or trapping. Thus, on its face, the provision "goes even beyond mere content discrimination, to actual viewpoint discrimination." *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. ____, 112 S. Ct. 2538, 2547 (1992).

For example, a demonstration held on state lands in *support* of sport hunting would not be subject to the provision, whereas a demonstration of identical or even smaller size in which the protesters sought to "dissuade" hunters — and which had the concomitant effect of "disturbing" them — is a crime punishable by imprisonment. The unequivocal terms of the provision, therefore, "suppress a particular point of view" on a matter of political and social controversy. *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 812 (1985); *see also Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. ____, 113 S. Ct. 2141, 2147-48 (1993) (the "principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'") *(quoting City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)); *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

While recognizing that the "consequences of this statute may fall more heavily on persons opposed to hunting than on those with different viewpoints," 13a, the Montana Supreme Court nevertheless insisted that the "use of the word 'dissuade'" does not render the statute content or viewpoint based. The Court provided the following explanation:

> The fact that speech or actions may disturb a hunter is not dependent on the content of what is expressed, or whether it is prompted by an antihunting sentiment. A person could blurt out anything at the moment a hunter is trying to shoot, and this could 'disturb' the hunter by distracting him or her, and by scaring the animals away. The content of what was said would be irrelevant . . . Furthermore . . . before the conduct would be culpable, the necessary scienter would have to be proven.

13a.

This rationale for why the statute is not content based, however, is internally inconsistent and contrary to this Court's First Amendment precedents. First, the "necessary scienter" that must be established aggravates rather than ameliorates the content based nature of the statute. Indeed, far from being "irrelevant" to a conviction, as asserted by the Court, *id.*, the "content of what was said" to a hunter will obviously be crucial to any determination of whether an individual had the requisite "intent to dissuade . . .."

Thus, as recognized by the Montana District Court, persons such as Mr. Lilburn who express any objection to hunting or trapping — on ethical, conservation, or other grounds — will, of course, be regarded by state officials as acting with the "intent to dissuade" hunters. On the other hand, persons who state enthusiastic support for hunting will not be deemed to be acting with the requisite scienter.

Moreover, even apart from its failure to come to grips with the statute's explicit incorporation of the "intent to dissuade," the Montana Supreme Court's conclusion that the statute is content-neutral is insupportable. It is evident that statements which "disturb" a hunter are far more likely to be those which reflect vehement opposition to hunting than those which encourage or are simply neutral towards the activity. *See, e.g., R.A.V., supra,* 112 S. Ct. at 2548 ("It is obvious that the symbols which will arouse 'anger, alarm or resentment in others on the basis of race, color, creed, or religion or gender' are those symbols that communicate a message of hostility based on one of these characteristics.").

Indeed, the Montana Supreme Court itself acknowledged that the statute was aimed directly at ***"confrontations between hunters and opponents of sport hunting,*** particularly with respect

to the *controversial bison hunts* . . .." 12a (emphasis added). Accordingly, the Court's own opinion confirms that the provision at issue "targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech." *Boos v. Barry, supra,* 485 U.S. at 321. In sum, the Montana Supreme Court's characterization as "content-neutral" of such a flagrantly viewpoint-based statute implicates serious First Amendment concerns and warrants review by this Court.

B. The Montana Supreme Court's Ruling That The Statute Is Not Overbroad Warrants Review.

In concluding that the statute at issue is not unconstitutionally overbroad, the Montana Supreme Court also adopted an approach that is fundamentally at odds with this Court's First Amendment principles. Indeed, the lower Court's approach, in effect, renders vast amounts of *public land* off limits to First Amendment speech and conduct.

As noted above, there is no doubt, as the Montana Supreme Court expressly held, that the statute at issue applies even to pure speech, so long as it "disturbs" hunters and is conveyed with the requisite intent to dissuade them from hunting. *See, e.g.*, 11a ("the disturbance which is prohibited may . . . result from a verbal utterance"). Thus, as recognized by both the Second Circuit and Idaho Supreme Court, this sort of statute suffers from precisely the kind of overbreadth that afflicted the ordinance reviewed in *City of Houston v. Hill, supra,* which, in pertinent part, made it unlawful for any person to verbally "interrupt any policeman in the execution of his duty . . .." 482 U.S. at 455. The Court concluded that this statute was substantially overbroad because

> [i]t is not limited to fighting words nor even to obscene or opprobrious language, but prohibits

> speech that 'in any manner . . . interrupt[s]' an officer. The Constitution does not allow such speech to be made a crime. The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.

Id. at 462-63 (footnotes omitted).

If the "First Amendment protects a significant amount of verbal criticism and challenge directed at police officers" on city streets, *id.* at 461, then it must also protect such "criticism and challenge" when directed at hunters on public lands. Indeed, just as the ordinance at issue in *Hill* provided the "police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them," *id*, at 465, the provision at issue here expressly proscribes all speech or conduct that in any way "disturbs" hunters and is conveyed with the intent to dissuade them from hunting. In short, it is difficult to imagine a statute that is more woefully overbroad and less carefully crafted to accomplish a permissible result than the one sustained by the Montana Supreme Court. *See also Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (invalidating an ordinance which broadly prohibited First Amendment activities in the Los Angeles airport).

In sustaining a sweeping prohibition on speech or conduct that causes a "disturbance" to a hunter, the Montana Supreme Court approved the state legislature's determination that "persons opposed to sport hunting had the right to express their views, ***but that there were other forums more suited to political discourse.***" 13a (emphasis added). Thus, the Court endorsed the state's position that a ban on anti-hunting demonstrations ***on public lands where hunting is actually being carried*** out is constitutionally permissible because persons opposed to

hunting remain free to express their views "on television, radio, in the newspapers, going door-to-door, or on any street corner or in any city park in Montana without violating the statute." State Br. at 28 (emphasis added); *see also* 11a ("the statute's proscriptions reach only activities which occur in the field during an otherwise lawful hunt").

However, that kind of approach — which essentially "foreclose[s] an entire medium of expression" — has been denounced by this Court time and again. *City of Ladue v. Gilleo*, 512 U.S. ____, 114 S. Ct. 2038, 2046 (1994). Indeed, last term the Court affirmed that

> [a]lthough prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent — by eliminating a common means of speaking, such measures can suppress too much speech.

Id.

Here, as in many contexts, the "medium is the message." Just as a demonstration at an actual abortion clinic (either for or against abortion rights) will convey a far more poignant political message than the same demonstration occurring elsewhere, so too will a protest at the site of actual hunting activity convey a more powerful message to other members of the public.

In fact, as the Montana District Court concluded following a review of the legislative history, "one of the purposes of the Act" at issue was to "*reduce publicity* which the controversial bison hunts were generating." 26a (emphasis added); *see also id. (quoting* the Director of the Montana DFWP as urging adoption of the statute because "[o]ne clear purpose of these demonstrators is attracting publicity"). Plainly, there-

fore, foreclosing "disturbing" speech or conduct on all public lands where hunting is actually taking place will have the unavoidable effect of, at a minimum, blunting the ability of persons with anti-hunting views effectively to convey their concerns to the public. *Cf. City of Ladue, supra,* 114 S. Ct. at 2046 ("Displaying a sign from one's own residence often carries a message quite distinct from placing the sign someplace else, or conveying the same text or picture by other means.").

Finally, the vastly overbroad nature of the statute is evident from this Court's recent ruling in *Madsen v. Women's Health Center, Inc.*, 512 U.S. ____, 114 S. Ct. 2516 (1994). In the course of reviewing an injunction regulating protesters' activities at an abortion clinic, the Court invalidated a broad "prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be . . .." *Id.* at 2529 (emphasis in original). The Court concluded that this provision hampered far more speech than necessary and that

> [a]bsent evidence that the protesters' speech is independently proscribale (*i.e.*, "fighting words" or threats) or is so infused with violence as to be indistinguishable from a threat of physical harm . . . this provision cannot stand.

Id. Under the statute approved by the Montana Supreme Court ruling, persons opposed to hunting are also forbidden from having *any* contact with hunters which may "disturb" them — including, for example, by merely handing out leaflets and other reading materials — irrespective of how peaceful the contact may be.[7]

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[7]Ironically, the Montana Supreme Court suggested that, because the *target* of the speech — *i.e.* the hunters — have weapons, this somehow justifies sweeping restrictions on the free speech rights of unarmed persons. 12a. In particular, the Court did not explain why prohibiting even pure

In sum, the Montana law at issue both "creates an impermissible risk of suppression of ideas" and also sweeps far "too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. ____, 112 S. Ct. 2395, 2401 (1992). Thus, for this reason as well, this Court's review and guidance is appropriate here, particularly in view of the many hunter harassment laws which have been adopted around the country.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Eric R. Glitzenstein
(Counsel of Record)
Katherine A. Meyer

Meyer & Glitzenstein
Suite 450
1601 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 588-5206

October 21, 1994

Attorneys for Petitioner

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speech and non-threatening conduct which simply "disturbs" hunters will have the effect of provoking "violent confrontations . . . " 13a

APPENDIX A

FILED
JUN 9 1994
ED SMITH
CLERK OF
SUPREME COURT
STATE OF
MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA 1994

No. 93-404

STATE OF MONTANA,
Plaintiff and Appellant,

v.

JOHN LILBURN,
Defendant and Respondent .

APPEAL FROM: District Court of the Eighteenth Judicial District, In and for the County of Gallatin, The Honorable Thomas A. Olson, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Hon. Joseph P. Mazurak, Attorney General, Chris Tweetan (argued), Chief Deputy Attorney General, Helena, Montana

Mike Salvagni, Gallatin County Attorney, Bozeman, Montana

For Respondent:

Richard Ranney (argued) and Shelton Williams, Williams & Ranney, Missoula, Montana

Noel K. Larrivee, Larrivee Law Offices, Missoula, Montana

For Amicus Curiae:

Lon J. Dale, Milodragovich, Dale & Dye, Missoula, Montana (Montana Shooting Sports Association, Inc., Western Montana Fish and Game Association, Inc., and Michigan United Conservation Clubs)

Submitted: April 19, 1994

Decided: June 9, 1994

Filed:

/s/ illegible

Clerk

Justice Terry N. Trieweiler delivered the opinion of the Court.

Defendant John Lilburn was charged in the Gallatin County Justice Court with the offense of hunter harassment in violation of § 87-3-142(3), MCA. He was convicted of that charge following a jury trial and appealed his conviction to the District Court for the Eighteenth Judicial District in Gallatin County. The District Court held that § 87-3-142, MCA, in its entirety, is facially unconstitutional in that it is both overbroad and vague, impermissibly infringing on the First Amendment right to free speech and the Fourteenth Amendment right to due process guaranteed by the United States Constitution.

We reverse the District Court.

The State raises the following issues on appeal:

1. Is Montana's Hunter Harassment law, found at § 87-3-142, MCA, void because it is overbroad in violation of the First Amendment to the United States Constitution?

2. Is § 87-3-142, MCA, void because of vagueness in violation of the Fourteenth Amendment to the United States Constitution?

In March 1990, the Department of Fish, Wildlife, and Parks (DFWP) allowed three persons whose names had been drawn from a permit pool to hunt bison which had migrated from Yellowstone National Park. One of the persons who received a permit was Hal Slemmer.

On the morning of the hunt, when the DFWP personnel located the bison, a group of 11 persons on snowmobiles and cross-country skis were seen attempting to herd the bison back into the park. The demonstrators were warned that this was a legal hunt, and were told not to interfere with the hunters. The hunters were also warned about the presence of the demonstrators and were cautioned to conduct the hunt safely.

Warden David Etzwiler of the DFWP accompanied Slemmer to a clearing where the bison were crossing. When one of the animals was in sight, Slemmer sighted his rifle and prepared to pull the trigger. At that time, John Lilburn, one of the protesters, moved in front of Slemmer, placing himself between Slemmer and the targeted bison at a distance of 10 to 12 feet from the muzzle of Slemmer's rifle. Slemmer lifted his rifle when he saw Lilburn's head and shoulders come into the scope of the gun. Warden Etzwiler approached Lilburn and told him that this was a lawful hunt and not to interfere. Slemmer moved about six feet to his left and selected another bison from the group. He raised his rifle and took aim through the scope. Lilburn again moved in front of Slemmer. Slemmer testified that when he saw Lilburn's face in his scope, he "jerked the gun up quickly because I had been squeezing on the trigger."

Warden Etzwiler and Slemmer got on their snowmobiles and moved to a different area where Slemmer shot and killed a bison before Lilburn and the other protesters caught up with them.

No arrests were made at that time. However, after DFWP officials conferred with the Gallatin County Attorney, Lilburn was charged with the offense of harassment, a misdemeanor, in violation of § 87-3-142(3), MCA. The complaint filed against Lilburn in the Gallatin County Justice Court alleged that he disturbed a hunter with the intent to dissuade or prevent the taking of a bison when he placed himslef beteween the bison and the hunter who was aiming a loaded rifle at the animal.

None of the other protesters were charged with a violation of this same statute.

Lilburn filed a declaratory judgment action in Federal District Court challenging the constitutionality of § 87-3-142(3), MCA, on a First Amendment basis. The U.S. District Court dismissed Lilburn's complaint, holding that there were no special circumstances warranting federal intervention in an ongoing state criminal action, and therefore, Lilburn's case did not merit an exception to the abstention doctrine enunciated in *Younger v. Harris* (1971), 401 U.S. 37, 91 S. Ct.746, 27 L. Ed. 2d 669. As a basis for its conclusion, the Federal Court concluded that the goal of the statute "is clearly reasonable" because "hunting is a legitimate activity which the state may protect in any reasonable and constitutionally permissible manner" and that this statute primarily "proscribes behavior which interferes with an individual actually engaged in the lawful taking of a wild animal."

The Ninth Circuit Court of Appeals subsequently affirmed the U.S. District Court's dismissal of Lilburn's constitutional challenge. *Lilburn v. Racicat* (9th Cir. July 13, 1992), No. 91-35310.

Lilburn was convicted following a jury trial in Gallatin County Justice Court. He appealed his conviction to the District Court and alleged that the harassment statute was unconstitutionally overbroad and vague. By order dated June 24, 1993, the District Court reversed the conviction and dismissed the complaint brought against Lilburn based on its determination that § 87-3-142, MCA, is unconstitutional on its face, and therefore, is invalid. The State appeals.

STANDARD OF REVIEW

A legislative enactment is presumed to be constitutional and will be upheld on review except when proven to be unconstitutional beyond a reasonable doubt. *City of Billings v. Laedeke* (1991), 247 Mont. 151, 154, 805 P.2d 1348, 1349 (citing *Fallon County v. State* (1988), 231 Mont. 443, 445-46, 753 P.2d 338, 339-40).

ISSUE 1

Is Montana's Hunter Harassment Law, found at § 87-3-142, MCA, void because it is overbroad in violation of the First Amendment to the United States Constitution?

The statute at issue in this appeal, commonly known as Montana's Hunter Harassment Law, provides as follows:

> 87-3-142. Harassment prohibited. (1) No person may intentionally interfere with the lawful taking of a wild animal by another.
>
> (2) No person may, with intent to prevent or hinder its lawful taking, disturb a wild animal or engange in an activity or place in its way any object or substance that will tend to disturb or otherwise effect the behavior of a wild animal.

> (3) No person may disturb an individual engaged in the lawful taking of a wild animal with intent to dissuade the individual or otherwise prevent the taking of the animal.
>
> (4) Nothing in this section prohibits a landowner or lessee from taking reasonable measures to prevent imminent danger to domestic livestock and equipment.

Lilburn was convicted of violating subsection (3) of this statute because he twice disturbed Slemmer's attempt to lawfully shoot a bison when he placed his body between Slemmer and the animal. The District Court, in its analysis of subsection (3) for overbreadth, concluded that § 87-3-142(3), MCA is "obviously content-based" because it "prohibits communication which is intended to dissuade a person from hunting, while allowing communication which encourages hunting." The court further concluded that the statute's prohibition would encompass "all verbal and expressive conduct which has the intention to dissuade from hunting," and therefore, such things as "prayer vigils at trailheads, the singing of protest songs or the burning of hunting maps, if done with the intent to dissuade a hunter, would be violations of the statute." Therefore, the court held that to the extent the statute "implicates constitutionally protected speech and expressive conduct, it is overbroad."

On appeal, the State contends that the court erred when it invalidated § 87-3-142(3), MCA, on the basis of overbreadth because the statute primarily proscribes conduct rather than speech, and to the extent that protected expression is reached, it regulates on a content-neutral basis only the time, place, and manner of expression. The State asserts that the statute is not overbroad because any potential unconstitutional applications are speculative and insubstantial when judged against the

plainly legitimate scope of this statute which is to promote safety in sport hunting and protect those engaged in lawful activities from interference. We agree.

We note first that Lilburn has raised a facial constitutional challenge and does not aver that the statute, as applied to him, unconstitutionally abridges his First Amendment guarantee of freedom of speech. Lilburn was not charged on the basis of any idea or view that he expressed, and he does not contend that his own conduct, which formed the basis of the charges brought against him, was constitutionally protected. Instead, he contends that the statute, as written, could potentially reach a substantial amount of protected speech or expressive conduct.

A facial overbreadth challenge is an exception to the general rule that statutes are evaluated in light of the situation and facts before the court. *R.A.V. v. St. Paul* (1992), 120 L. Ed. 2d 305, 336, 112 S. Ct. 2538, 2558 (J. White, concurring) (citing *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 610, 93 S. Ct. 2908, 2915, 37 L. Ed. 2d 830, 838-39). This Court has similarly recognized that a statute which can be applied to constitutionally protected speech and expression may be found to be invalid in its entirety, even if it could validly apply to the situation before the court. *City of Whitefish v. O'Shaughnessy* (1985), 216 Mont. 433, 704 P.2d 1021.

In his overbreadth challenge, Lilburn disputes the State's assertion that the statute primarily regulates conduct but contends that it criminalizes a broad category of speech and expressive conduct based on its content. He claims that the law reaches primarily conduct which conveys an anti-hunting sentiment, while allowing, under exactly the same circumstances, conduct and speech which conveys any other message. Lilburn cites *R.A.V. v. St. Paul*, 120 L. Ed. 2d at 316, 112 S. Ct. at 2542, for the proposition that the statute is "facially un-

constitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."

Broadrick, 413 U.S. at 601, is the leading case addressing the First Amendment overbreadth doctrine. In *Broadrick*, the Supreme Court clarified that a statute or government regulation should be invalidated on the basis of facial overbreadth in only limited situations:

> In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes. . . .
>
> . . . Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. (Citations omitted).

Broadrick, 413 U.S. at 612-13. The Court in *Broadrick* adopted limitations on the overbreadth doctrine "particularly where conduct and not merely speech is involved," and held that a statute which has constitutional applications may be facially invalidated for overbreadth only if its overbreadth is "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. The Court made clear that the existence of imaginary potential unlawful applications does not by itself render a statute facially overbroad. *Broadrick*, 413 U.S. at 615.

In *Members of the City Council v. Taxpayers for Vincent* (1984), 466 U.S. 789, 800-01, 104 S. Ct. 2118, 2126, 80 L.

Ed. 2d 772, 783-84, the Supreme Court further explained the parameters of the overbreadth doctrine:

> It is clear . . . that the mere fact that one can concieve of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. On the contrary, the requirement of substantial overbreadth stems from the underlying justification for the overbreadth exception itself — the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court. . . . In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.

After reviewing the statute in question and the arguments set forth by Lilburn, we conclude that this is precisely the type of situation where the limitations imposed by the Supreme Court on the overbreadth doctrine must be carefully applied. Before the hunter harassment statute can be invalidated on its face, there must be a clear showing that the potential invalid applications of the statute be both "real and substantial." For the reasons stated below, we conclude that no such showing has been made in this case.

Under the tests articulated in *Broadrick* and *Taxpayers for Vincent*, we must determine whether there is a real and substantial probability that § 87-3-142(3), MCA, will compromise recognized First Amendment protections when judged in relation to any "plainly legitimate sweep" of the statute.

The District Court based its holding regarding overbreadth on its determination that the statute is "obviously content-based" and could potentially proscribe

> *all verbal and expressive conduct which has the intention to dissuade from hunting.* Conduct such as prayer vigils at trailheads, the singing of protest songs or the burning of hunting maps, if done with the intent to dissuade a hunter, would be violations of the statute. (Emphasis added).

It was the court's opinion that the statute prohibits communication which is intended to dissuade a person from hunting, while allowing a communication which encourages hunting, even if such communication prevents or distracts a hunter from taking the prey. While this analysis was not necessary to an overbreadth analysis under *Broadrick*, we also disagree with this interpretation of the statute.

All statutes carry with them a presumption of constitutionality and it is a duty of the courts to construe statutes narrowly to avoid constitutional difficulties if possible. *Montana Automobile Association v. Greely* (1981), 193 Mont. 378, 382, 632 P.2d 300, 303; *State v. Ytterdahl* (1986), 222 Mont. 258, 261, 721 P.3d 757, 759. This Court made clear that, when construing a statute, it must be read as a whole, and terms used in the statute should not be isolated from the context in which they are used by the Legislature. *McClanathan v. Smith* (1980), 186 Mont. 56, 61, 606 P.2d 507, 510. Furthermore, a statute must be construed according to the plain meaning of the language used therein. *Norfolk Holdings, Inc. v. Department of Revenue* (1991), 249 Mont. 40, 43, 813 P.2d 460, 461.

Section 87-3-142(3), MCA, prohibits a person from disturbing another individual engaged in the lawful taking of a wild animal with intent to dissuade the individual or otherwise prevent the taking of the animal. The term "wild animal" is defined to mean "any game animal, fur-bearing animal, or predatory animal," and a "taking" is defined to include "pursuit, hunting, trapping, shooting, or killing of a wild animal on land

upon which the affected person has the right or privilege to pursue, hunt, trap, shoot, or kill the wild animal." Section 87-3-141, MCA.

The plain language of the statute, considered in light of these limiting definitions, makes clear that the statute's proscriptions reach only activities which occur in the field during an otherwise lawful hunt. While the disturbance which is prohibited may, under other circumstances, result from a verbal utterance, it makes no difference what the content of the verbal utterance is. The language of the statute does not support the assertion that the statute is aimed primarily at pure speech and expressive conduct conveying only an anti-hunting sentiment. The disturbance could just as well be caused by shouting "fire!"

Lilburn disagrees that the statute regulates primarily conduct and claims that the Legislature's inclusion of the word "dissuade" demonstrates that the intent of the statute is to proscribe only a very small class of expression which is uttered or carried out with the intent to dissuade a hunter from taking an animal. He contends it is the Legislature's use of the term "dissuade" that renders this a content-based regulation.

The Supreme Court has provided clear guidelines for distinguishing a content-neutral regulation from one which is impermissibly content-based:

> The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has

> an incidental effect on some speakers or messages but not others. (Citation omitted).

Ward v. Rock Against Racism (1969). 401 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661, 675. The determination of whether a regulation is content-based turns not on whether its incidental effects fall more heavily on expression of a certain viewpoint, but rather on whether the governmental purpose to be served by the regulation is not motivated by a desire to suppress the content of the communication. *City of Renton v. Playtime Theatres, Inc.* (1986), 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29. Therefore, even if a statute has a discriminatory impact, it can be determined to be content-neutral if its objective neither advances nor inhibits a particular viewpoint.

Neither of the parties dispute the fact that safety and an orderly regulation of hunting are legitimate state goals. This Court has made clear that "[i]n the area of wildlife regulation, it is sufficient to state the Legislature may impose such terms and conditions as it sees fit, as long as constitutional limitations are not infringed. *State v. Jack* (1975), 167 Mont. 456, 460, 539 P.2d 726, 728.

Here, the legislative history demonstrates a motivation for adoption of this statute which is unrelated to the suppression of speech based on content. The Legislature was aware that confrontations between hunters and opponents of sport hunting, particularly with respect to the controversial bison hunts, could occur in the field when hunters were armed and actively pursuing their prey.It was recognized that this posed a serious danger to both hunters and those interfering with their activities.

Contrary to the court's conclusion that the legislation was obviously content-based because it was prompted by past

activities opposing the bison hunts, the legislative history supports a conclusion that the motivation was to prevent violent confrontations and to prevent interference with lawful activities. Moreover, we do not find any support in the legislative history for the contention that this was an attempt to silence the views of those opposed to the bison hunt or other types of sport hunting. It was recognized that persons opposed to sport hunting had the right to express their views, but that there were other forums more suited to political discourse.

While Lilburn asserts that the use of the word "dissuade" relates the statute entirely to speech and expressive conduct, we note that the Legislature did not use the word "dissuade" in isolation. Reading the statute as a whole, it is clear that the conduct proscribed is the "disturbance" of a hunter engaged in a lawful activity, when it is done with the intent to either dissuade the hunter or to prevent the taking of the animal. The fact that speech or actions may disturb a hunter is not dependent on the content of what is expressed, or whether it is prompted by an anti-hunting sentiment. A person could blurt out anything at the moment a hunter is trying to shoot, and this could "disturb" the hunter by distracting him or her, or by scaring the animal away. The content of what was said would be irrelevant. Or, persons could attempt to prevent the taking of the animal for reasons other than opposition to hunting, such as a desire to shoot the animal themselves. Furthermore, in either of these instances, before the conduct would be culpable, the necessary scienter would have to be proven.

We recognize that the consequences of this statute may fall more heavily on persons opposed to hunting than on those with different viewpoints, but this does not by itself render the statute content-based. The existence of a content-neutral motivation for the statute is all that is required under *Ward*

and *Renton* to refute the characterization that the statute impermissibly regulates speech or conduct based on the message conveyed. We are satisfied that such a motivation exists in this instance. Therefore, we reject the District Court's conclusion that the statute is content-based.

Even though we disagree with the District Court's rationale for a holding of overbreadth, we realize, as conceded by the State, that there may be instances where protected expression or pure speech may violate the statute. However, before invalidating the statute on the basis of overbreadth, we must consider the limitations set forth in *Broadrick* to determine if the possible unconstitutional applications are real and substantial when judged in relation to the plainly legitimate scope of the statute.

Lilburn contends that there are a significant number of situations where the law could be applied in an unconstitutional manner and urges the Court to "use our imagination to think of the various ways the statute might be applied against speech or expressive conduct." However, the test is not whether hypothetical remote situations exist, but whether there is a significant possibility that the law will be unconstitutionally applied. *Broadrick*, 413 U.S. at 615.

Based on our conclusion that the plain language of the statute is directed primarily at conduct and if at speech, then without regard to its content, we conclude, in the absence of evidence otherwise, that Lilburn has not shown that any overbreadth of the statute is "substantial . . . judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

Finally, we address the District Court's comparison of the Montana statute to a Connecticut hunter harassment statute which was held unconstitutional on the basis of overbreadth.

Dorman v. Satti (D. Conn. 1988), 678 F. Supp. 375, *aff'd*, 862 F.2d 432 (2nd Cir. 1988), *cert. denied* (1989), 490 U.S. 1099, 109 S. Ct. 2450, 104 L. Ed. 2d 1005.

The Federal District Court, when it rejected Lilburn's constitutional challenge, noted that Montana's hunter harassment statute is distinguishable from the Connecticut statute, and does not unconstitutionally interfere with free speech. In *Dorman*, the statute reached conduct which interfered with both the actual taking of game and with "acts in preparation" for the taking of game. The court held that the statute could legitimately proscribe interference with "lawful taking,' but not "acts in preparation":

> So long as the legislature elects to permit hunters to pursue their activity on property, during times, and under circumstances set aside for that purpose, it may also regulate the conduct of nonhunters in those contexts. Considerations of safety, alone, would justify such regulation, even if it impinges incidentally upon protected speech. On the other hand, the propriety of hunting and taking wildlife is a fair subject for spirited debate. *Once a hunter is outside the scope of his "lawful hunt"* he is no different from any other unreceptive listener who must, "in vindication of our liberties," be "exposed to the onslaught of repugnant ideas." [Emphasis added].

Dorman, 678 F. Supp. at 383.

The statute at issue in this case, § 87-3-142(3), MCA, is clearly limited in scope to activities which interfere with persons actively engaged in the lawful taking of an animal and does not suffer from the same overbreadth as the statute in *Dorman*.

We hold that § 87-3-142(3), MCA, is not unconsitutionally

overbroad. To the extent that the statute may reach constitutionally protected expression, we conclude, as did the Supreme Court in *Broadrick*, 413 U.S. at 615-16, that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations where the statute is assertedly being applied unconstitutionally.

ISSUE 2

Is § 87-3-142, MCA, void because of vagueness in violation of the Fourteenth Amendment to the United States Constitution?

The District Court also invalidated the hunter harassment statute on the basis of vagueness. The court concluded that several key terms are left undefined, and that the statute impermissibly leaves to the discretion of law enforcement and the courts, without specific statutory guidance to law enforcement officers or the public at large, what type of conduct is prohibited.

In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982), 455 U.S. 489, 497, 102 S. Ct. 1186, 1193, 71 L. Ed. 2d 362, 371, the Supreme Court set forth guidelines for analyzing a facial challenge on the basis of overbreadth and vagueness. When such a challenge is raised, a court must first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. Here we have concluded that the statute does not, and that the overbreadth challenge must fail. The Supreme Court has also made clear that if the challenged statute is reasonably clear in its application to the conduct of the person bringing the challenge, it cannot be stricken on its face for vagueness. *Hoffman Estates*, 455 U.S. at 494-95. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. *Parker v. Levy* (1974), 417 U.S. 733, 756." *Hoffman Estates*, 455 U.S. at 495 n.7.

In this instance, regardless of the hypothetical situations that may exist, Lilburn's conduct was unquestionably proscribed by the hunter harassment statute. Lilburn intentionally twice stood between Slemmer and the targeted bison, directly in the line of fire, in order to prevent the animal from being shot. It is difficult to conceive of an argument that Lilburn did not "disturb" Slemmer while Slemmer was engaged in the lawful taking of a wild animal with the intent to prevent or dissuade him from making the shot.

We conclude that Lilburn does not have a standing to raise a facial vagueness challenge. The court's order with respect to the issue of vagueness is reversed on this basis.

We reverse the District Court's conclusion that the statute under which Lilburn was charged is impermissibly overbroad and vague, and vacate the court's dismissal of the charges brought against Lilburn. Furthermore, although Lilburn's constitutional challenge focused only on subsection (3) of the statute, the language of the District Court's order invalidated § 87-3-142, MCA, in its entirety. We find no basis in the record for the court's determination that the remaining sections of the statute are constitutionally deficient. We, therefore, reverse the order of the District Court, with regard to all parts of § 87-3-142, MCA.

This case is remanded to the District Court for further proceedings consistent with this opinion.

Terry Trieweiler

Justice

We concur:

signatures illegible

APPENDIX B

FILED
June 24, 1993
Lorraine VanAusdol
Clerk
By illegible
Deputy

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT,
GALLATIN COUNTY

Cause No. DC 92-70

STATE OF MONTANA,

Plaintiff,

v.

JOHN LILBURN,

Defendant.

ORDER DISMISSING CHARGE

On March 30, 1990, defendant was arrested for harassment, in violation of section 87-3-142(3), MCA, a misdemeanor. He was found guilty by a jury in justice court, and he appealed to this court. This matter was set for trial on June 26, 1993. By agreement of the parties, the trial was vacated to consider defendant's motion to dismiss the criminal complaint on the grounds that section 87-3-142 is unconstitutionally vague and overbroad, impermissibly infringing on his First Amendment right of free speech under the United States Constitution. The State of Montana argues the statute is a legitimate exercise of the state's police power and is not a violation of the First Amendment. Oral argument was heard on the motion June 26, 1992, and the court allowed the parties time to file supplemental briefs.

The court now holds that section 87-3-142, MCA, imper-

missibly infringes upon the defendant's constitutionally protected rights of free speech, and is therefore invalid. Defendant's motion to dismiss is granted.

Dated this 24th day of June, 1993.

/s/ Thomas A. Olson

HON. THOMAS A. OLSON
District Judge

MEMORANDUM

At issue in this case is whether section 87-3-142, MCA, commonly known as the Montana Hunter Harassment Law, is vague and overbroad in violation of an individual's right of free speech under the First Amendment of the United States Constitution?

Factual Background

On March 13, 1990, Captain Hubbard of the Montana Department of Fish, Wildlife and Parks (FWP) met with three hunters for a special, controversial bison hunt at Horse Butte by Hebgen Lake, Gallatin County, Montana to shoot bison that had left the confines of Yellowstone National Park. Defendant and ten other persons from the group Fund for Animals were also in the area attempting to herd bison which had strayed outside the boundaries of Yellowstone Park, back into the Park. Members of the media and "hunters helpers" were also present, for a total of over 40 people present for the event.

Discussion took place between Captain Hubbard and members of the Fund for Animals concerning the propriety of the hunt. Hubbard informed the hunters they could expect some harassment from the protestors but that the hunters were free to shoot bison if they chose. The event unfolded

in this unpredictable setting, with both hunters and protestors being filmed by the media. As one of the hunters, Hal Slemmer, selected a bison and took aim with his rifle, the defendant moved so he stood between Slemmer and the bison and said, "Don't shoot!" Slemmer moved away and attempted to aim at another bison, but the defendant moved with him. At this point a confrontation occurrred between FWP warden Etzwiler and the defendant, when Etzwiler shoved the defendant out of the way. Etzweiler then escorted Slemmer to another area where Slemmer shot and killed a bison.

Defendant was arrested March 30, 1990, for violation of section 87-3-142(3), MCA, for "knowingly or purposely disturb[ing] an individual engaged in the lawful taking of a wild animal with the intent to dissuade the individual or otherwise prevent the taking of the wild animal when he placed his body between Hal Slemmer and a wild buffalo while Hal Slemmer was aiming a loaded rifle at the wild buffalo. . .." No other protester or observer was arrested for violation of this statute.

Scope of Review for Constitutional Issues

All statutes are presumed constitutional, and the person challenging a statute's constitutionality bears the burden of showing otherwise. *Montana Automobile Association v. Greely*, 632 P.2d 300, 303 (Mont. 1981). However, "[w]hen it has been demonstrated that a statute infringes upon First Amendment freedoms, a presumption of constitutionality is no longer available." *Id.* Significant interference with First Amendment rights may be allowed only if a compelling government interest is shown, and all such infringements will be subject to close judicial scrutiny. *Id.* at 308.

Courts also have a duty to narrowly construe statutes to avoid constitutional difficulties if possible. *State v. Ytterdahl*, 222 Mont. 258, 261, 721 P.2d 757, 759 (1986); *accord City*

of Whitefish v. O'Shaughnessy, 216 Mont. 433, 442, 704 P.2d 1021, 1027 (1985) and *City of Billings v. Batten*, 218 Mont. 64, 70, 705 P.2d 1120, 1124 (1985). *See also, R.A.V. v. City of St. Paul*, __ U.S. __, __ S.Ct. __, 60 LW 4667, 4677 (June 22, 1992).

First Amendment Analysis

The right to free speech is protected under both the United States Constitution and the Montana Constitution. Defendant challenges section 87-3-142, MCA, under the First Amendment to the United States Constitution, which is applicable to the states through the due process clause of the Fourteenth Amendment.

The right to free speech is not absolute, and there are certain narrowly limited classes of speech, such as obscenity and "fighting words" which may be regulated upon the showing of a compelling government interest. *City of Whitefish v. O'Shaughnessy*, 216 Mont. at 438, 704 P.2d at 1024, citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

The court first must determine whether the statute regulates the content of the speech or whether the statute is content-neutral. "[T]he appropriate level of scrutiny is initially tied to whether the statue distinguishes between prohibited and permitted speech on the basis of content." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). In *Frisby v. Schultz*, abortion opponents challenged a town ordinance prohibiting picketing in front of individual residences. The United States Supreme Court upheld the ordinance because it was content-neutral, was narrowly tailored to serve a significant governmental interest (protection of residential privacy), and left open ample alternative channels of communication for expression of opinions.

While reasonable time, place, and manner restrictions may be placed on content-neutral speech, regulation of speech on the basis of its content is not constitutionally permissible. *Consolidated Edison v. Public Service Commission,* 447 U.S. 530, 536 (1980) (Public Service Commission may not issue an order barring utilities from placing inserts in customers' bills which discuss controversial public policy issues); In *Texas v. Johnson,* 491 U.S. 397 (1989), the defendant was arrested for burning the flag at the Republican National Convention in Dallas. The Supreme Court found that the Texas statute prohibiting flag desecration was content-based, and stated, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

The Montana Hunter Harassment law

In 1987 the Montana Legislature passed into law House Bill 211 entitled "AN ACT TO PROHIBIT HARASSMENT OF HUNTERS AND TRAPPERS." The Act contained definitions only of "taking" and "wild animal", set forth the offense of harassment, set a maximum penalty and allowed injunctions to enjoin conduct in violation of the Act.[1] Section 87-3-142(3) states:

> "no person may *disturb* an individual engaged in the lawful taking of an animal ***with intent to dissuade the individual or otherwise prevent the taking of the animal.***" (Emphasis added)

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[1]The Act's use of injunctions also raises the constitutional problem of prior restraint on speech, which carries a "heavy presumption" of constitutional invalidity. *Organization For A Better Austin v. Keefe,* 402 U.S. 415, 419-420 (1971). However, this issue was not raised by the parties and the court does not reach the prior restraint issue.

"Intent to dissuade" is not defined in the statute, but clearly encompasses expressive conduct. According to *The American Heritage Dictionary* (1982), "dissuade" is "[t]o discourage from a purpose or course of action by persuasion." "Persuade" is "[t]o cause someone to do something by means of argument, reasoning or entreaty." Clearly, the statute prohibits not only physical interference with the legitimate taking of a wild animal, which would be a proper exercise of the state's police power, but the statute goes much further and prohibits verbal, written or sympolic speech and expression which *dissuades* the hunter from taking the prey. Simply stated, the Act punishes communication which has as its purpose inducing others not to hunt. "The mere fact that communication induces or 'coerces' action in others does not remove it from first amendment protection." *Wurtz v. Riley*, 719 F.2d 1438, 1441 (9th Cir.1983); *see also, Montana Automobile Ass'n v. Greely*, 632 P.2d at 305 ("The constitutional guaranty of free speech provides for the opportunity to persuade to action, not merely to describe facts.").

Section 87-3-142(3) is obviously content-based. It prohibits communication with hunters which is intended to dissuade them from hunting, while allowing communication with hunters which encourages hunting, even if such communication prevents a hunter from taking the prey. For example, if a bystander exclaims, "There he is! Shoot! Shoot!" and the commotion causes the hunter to miss his shot, the bystander cannot be prosecuted. However, if that same bystander said, "There he is! Don't shoot! Don't shoot!" the speaker could be prosecuted.

The legislative history of H.B. 211 supports the conclusion that section 87-3-142 is directed solely at the anti-hunting point of view. H.B. 211's sponsor, Representative Jerry Devlin, House District #25, stated that the bill was introduced because

of threats to disrupt the bison hunt near Yellowstone Park made by certain groups opposed to the hunts. (Minutes of the meeting of the Fish and Game Committee, Montana State Senate, March 12, 1987). The legislative history also reveals that the bison hunts in Yellowstone Park have been the sole source of "hunter harassment"; no testimony or evidence concerning other confrontations between hunters and nonhunters was elicited. (Minutes of the meeting of the Fish and Game Committee, Montana House of Representatives, January 22, 1987, and Montana Senate, March 12, 1987). FWP Director Jim Flynn testified, "One clear purpose of these demonstrators is attracting publicity to the anti-hunting, anti-trapping cause." (Testimony before the Fish and Game Committee, Montana House of Representatives, January 22, 1987).

Having determined that the statute in question is content-based rather than content-neutral, this court must apply strict scrutiny to determine whether the statute serves a compelling government interest and is narrowly drawn to achieve that end. *Boos v. Barry,* 485 U.S. 312, 321 (1988) and *Frisby v. Schultz,* 487 U.S. 474, 481 (1988) (both cases quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983)). The state asserts that the statute merely is designed to keep the peace, and is not adressed primarily at stifling anti-hunting sentiment.

"In the area of wildlife regulation, . . . the legislature may impose such terms and conditions as it sees fit, as long as constitutional limitations are not infringed." *State v. Jack,* 167 Mont. 456, 460, 539 P.2d 726, 728 (1975). The state also has a legitimate interest in preserving the peace and maintaining the safety of its citizens. However, the state may not assume "that every expression of a provocative idea will incite a riot." *Texas v. Johnson,* 491 U.S. at 409. In fact, the legislative record in this case indicates that hostile confronta-

tions between hunters and preservationists are a projected threat rather than a common occurrence. (Testimony of Jim Flynn, minutes of the House Fish and Game Committee, January 22, 1987: "Should these incidents become more prevalent in Montana — and occurrences in other states suggest they will — the law can be used to preserve the peace before serious incident occurs." and testimony of Rep. Devlin: "there hasn't been a problem in Montana yet."). While safety of human beings during a hunt is an important and a legitimate concern, the state may not go beyond this goal and regulate in favor of the expression of one viewpoint over another. Section 87-3-142, with its emphasis on penalizing those who speak against hunting and trapping, impermissibly extends into the arena of public debate of a current issue. "A regulation that denies one group of persons the right to address a selected audience on 'controversial issues of public policy' is plainly [a regulation in violation of the First Amendment]." *Consolidated Edison v. Public Service Commission*, 447 U.S. at 546.

Since protected speech is involved in this case, the next step is to determine whether section 87-3-142 is vague or overbroad, and whether the statute's overbreadth is not only "real but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). "Vagueness" applies where a statute is so unclear or indefinite that a person of ordinary intelligence is without notice as to what activity is proscribed, or which is so indefinite as to encourage arbitrary or discriminatory enforcement. *City of Billings v. Batten*, 218 Mont. at 70, 705 P.2d at 1124; *Dorman v. Satti*, 678 F.Supp. 375, 380 n.6 (D.Conn. 1988), *aff'd* 862 F.2d 432 (2nd Cir. 1988). "Overbreadth" applies where a statute reaches constitutionally protected activity. *Id.*

In examining section 87-3-142 for overbreadth, it is evident

the statute encompasses all verbal and expressive conduct which has the intention to dissuade from hunting. Conduct such as a prayer vigils at trailheads, the singing of protest songs or the burning of hunting maps, if done with the intent to dissuade a hunter, would be violations of the statute. It is clear the statute specifically was enacted in response to the perceived threat of disruptive citizen protests conducted on public lands aimed in opposition to the Montana FWP's policy on bison hunts (which policy has since been changed). While the stated rationale of H.B. 211's supporters was for safety and order during the bison hunts, and while defendant Lilburn's act of positioning himself in front of a loaded weapon placed him in great danger, the "literal scope" of the statute draws in speech and expression which is neither criminal nor beyond constitutional protection.

Interestingly, one of the purposes of the Act was to reduce publicity which the controversial bison hunts were generating. FWP Director Jim Flynn urged adoption of the Act because "[o]ne clear purpose of these demonstrators is attracting publicity." (Minutes of the Fish and Game Committee, Montana Senate, March 12, 1987). Indeed, the March 13th hunt was well attended by members of the media with television cameras, and numerous other persons. To the extent section 87-3-142 implicates constitutionally protected speech and expressive conduct, it is overbroad.

Section 87-3-142 is also vague. The statute penalizes "harassment" which is defined in the subsections of the statute as "intentional interference" and "disturbing with intent to dissuade," but "interference", "disturb", and "intent to dissuade" are not defined. The statute delegates to law enforcement officers, prosecutors and judges the determination of what conduct will constitute "harassment." This potential for arbitrary enforcement was raised by Senator

William Yellowtail during Senate discussions of the house bill, with the response from Rep. Devlin that the determination of a defendant's intent to interfere "would have to be made by the judge in the event charges were filed." (Minutes of the Fish and Game Committee, Montana Senate, March 12, 1987). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). In *Grayned*, a black high school student was charged with violating Rockford's anti-picketing and anti-noise ordinances which prohibited picketing and disturbing the peace of schools while in session. The Supreme Court upheld the anti-noise ordinance (Justice Douglas dissenting) on the basis that it was narrowly tailored, did not "permit punishment for the expression of an unpopular point of view, and it contain[ed] no broad invitation to subjective or arbitrary enforcement." *Id.* at 113. The arbitrariness of enforcement is obvious in this case, where although over 40 people were present at the bison hunt, at least 11 of whom actively were opposing it, only one was arrested under this statute.

"[W]hen a penal statute's 'literal scope, unaided by a narrowing state court interpretation,' could reach such a fundamental right as freedom of speech sheltered by the first amendment, the void-for-vagueness doctrine 'demands a greater degree of specificity than in other contexts.' " *Dorman v. Satti*, 678 F.Supp at 380, citing *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974). It is evident in this case interpretation of the offense of harassment is left to the discretion of law enforcement and the courts, without specific statutory guidance to either law enforcement officers or the public at large as to what conduct is prohibited.

This court finds that section 87-3-142 is not susceptible to

a narrowing construction which would avoid infringing on First Amendment rights of speech and expression. The court notes that the state has at its disposal alternative means of keeping the peace, the most obvious of which is the charge of misdemeanor assault, with which one of the protestors was charged. Section 45-5-201(1)(c), MCA, provides for prosecution of a person who "purposely or knowingly makes physical contact of an insulting or provoking nature with any individual." Criminal mischief, section 45-6-101(1), MCA, may be charged where an individual tampers with another's property so as to interfere with its use. Thus, the state has other, less constitutionally burdensome, avenues of enforcing the public order than to criminalize dissident points of view.

Dorman v. Satti and State v. Bagley

The court has considered two other decisions involving hunter harassment statutes, *Dorman v. Satti*, 678 F.Supp. 375 (D.Conn. 1988), *aff'd* 862 F.2d 432 (2nd Cir. 1986) and *State v. Bagley*, 474 N.W.2d 761 (Wisc.App. 1991). While neither the Connecticut statute nor the Wisconsin statute is identical to Montana's statute, there is similarity in the Connecticut statute. The Wisconsin statute is an example of precise drafting. Its definition of "interference" is clearly limited to physically impeding and obstructing and, more significantly, provides as an affirmative defense that "the defendant's conduct is protected by his or her right to freedom of speech under the constitution of this state or of the United States." *State v. Bagley*, 474 N.W.2d at 763-64.

In *State v. Bagley*, defendants intentionally prevented Indian spearfishers from launching a boat by blocking the boat landing with their own boat. Therre was no indication in the court's opinion that any protected speech or expressive conduct was involved. In the case before this court, defendant and

his group were part of an organized citizen protest aimed at Montana FWP's bison hunt policy, and expressive speech was involved.

In *Dorman v. Satti,* the defendant, who was "morally opposed to the hunting and senseless killing of harmless and defenseless animals, including waterfowl," approached hunters on state land "with the intention of convincing them to abandon their plans to hunt," walking and talking with the hunters and refusing to leave. *Dorman v. Satti,* 678 F.Supp. at 377-78. Both the federal district court and the court of appeals found that the statute was content-based since its clear intent was to proscribe only conduct which opposed hunting. The Connecticut statute, like the Montana statute, was not narrowly tailored to avoid protected speech, and was held void under First Amendment principles.

Conclusion

Defendant Lilburn used his First Amendment rights as part of a protest in support of his belief that the buffalo hunt was morally wrong. While his action of stepping in front of a loaded rifle was an exceedingly dangerous act and provacative to Mr. Slemmer, "one of the prerogatives of American citizenship is the right to criticize public men and measures — and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner v. United States,* 322 U.S. 665, 673-74 (1944). Absent a particularized and content-neutral statute narrowly tailored to promote physical safety, the state may not, in violation of the First Amendment, criminally prosecute citizens opposed to hunting because they attempt to dissuade a hunter, especially at what had become a publically attended event. The Montana Legislature could have drafted a narrow physical in-

terference statute which would promote public safety and which would not punish speech, but it did not.

Dated this 24th day of June, 1993.

/s/ Thomas A. Olson

HON. THOMAS A. OLSON
District Judge

(2)

Supreme Court, U.S.
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No. 94-723

In The

Supreme Court of the United States

October Term, 1994

JOHN LILBURN,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of Montana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH P. MAZUREK
Attorney General
CHRISTIAN D. TWEETEN*
Chief Deputy Attorney General
CLAY R. SMITH
Solicitor
State of Montana
Justice Building
P.O. Box 201401
Helena, MT 59620-1401
(406)444-2026

*Counsel of Record

32pp

QUESTION PRESENTED

Is a statute which prohibits conduct intended to interfere with a hunter engaged in the lawful taking of a game animal facially overbroad in violation of the First Amendment?

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Durrant, Sean P., *Wyoming's Hunter Interference Law--Anarchy in the Woods: How Far Afield Does the Right to Free Speech Extend?*,
27 Land & Water L. Rev. 505 (1992), Comment 14

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OPINIONS AND JUDGMENTS OF COURTS BELOW

In addition to the cases cited in the Petition at 1, Petitioner sought to litigate the constitutional issue presented in this case in a declaratory judgment action filed in the United States District Court for the District of Montana. The federal district court rejected Petitioner's complaint on abstention grounds, *Lilburn v. Racicot*, 855 F. Supp. 327 (D. Mont. 1991). Appendix to Brief in Opposition [hereinafter Opp. App.] 1a. The United States Court of Appeals for the Ninth Circuit affirmed the decision in an unreported opinion, *Lilburn v. Racicot*, No. 91-35310 (9th Cir. July 13, 1992).

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JURISDICTION AND TIMELINESS

Respondent agrees that the Court has jurisdiction of the petition. Respondent received service of the petition on October 27, 1994. This response is timely if served by First Class mail on or before November 28, 1994. Sup. Ct. R. 15.2, 29.2, 30.1.

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STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The text of the First Amendment to the United States Constitution is set forth in the petition at 2. The verbatim text of the statutory provisions at issue is as follows:

> **87-3-141. Definitions.** As used in 87-3-141 through 87-3-144, the following definitions apply:
>
> (1) "Taking" means the pursuit, hunting, trapping, shooting, or killing of a wild

animal on land upon which the affected person has the right or privilege to pursue, hunt, trap, shoot, or kill the wild animal.

(2) "Wild animal" means any game animal, fur-bearing animal, or predatory animal, as defined in 87-2-101.

87-3-142. Harassment prohibited. (1) No person may intentionally interfere with the lawful taking of a wild animal by another.

(2) No person may, with intent to prevent or hinder its lawful taking, disturb a wild animal or engage in an activity or place in its way any object or substance that will tend to disturb or otherwise affect the behavior of a wild animal.

(3) No person may disturb an individual engaged in the lawful taking of a wild animal with intent to dissuade the individual or otherwise prevent the taking of the animal.

(4) Nothing in this section prohibits a landowner or lessee from taking reasonable measures to prevent imminent danger to domestic livestock and equipment.

STATEMENT OF THE CASE

In 1987, the Montana legislature enacted the Montana Hunter Harassment statutes, Mont. Code Ann. §§ 87-3-141 to -144, making it a misdemeanor offense to engage in various kinds of conduct that interferes with a lawful sport hunt. The statutes apply only to conduct occurring in the field that actually disturbs wildlife or interferes with a lawful hunt. *See* Pet. App. 11a. The legislature's motivation for enactment of the statute, as reflected in the legislative history and expressly found by the Montana Supreme Court, was to promote safety for hunters and for others using lands where hunting occurs, including those opposed to sport hunting, by avoiding contact, and potential conflict, between

armed hunters and persons intending to prevent the successful completion of a lawful hunt. Pet. App. 12a. The facts of this case demonstrate the soundness of the legislature's judgment.

On March 13, 1990, Petitioner John Lilburn was one of a group of individuals who attempted to disrupt a lawful bison hunt on national forest land in southwest Montana.[1] The group members unsuccessfully attempted to drive a bison herd into Yellowstone National Park, where hunting the bison would have been illegal. Pet. App. 3a. Petitioner then attempted to prevent one of the licensed hunters, Hal Slemmer, from making a shot. As Slemmer sighted in on a bison through the scope of his hunting rifle in preparation for making a shot, he saw Petitioner's head and torso suddenly appear in his scope. Petitioner had taken up a position directly between Slemmer and his target. Slemmer did not fire and raised the barrel of his rifle off his target. *Id.*

A nearby game warden confronted Petitioner, and Slemmer selected another target animal and prepared to make his shot. As Slemmer began to squeeze the trigger of his rifle, he again saw Petitioner's head and torso suddenly appear in the scope. Slemmer jerked his rifle skyward to avoid shooting Petitioner, who had again assumed a position directly between Slemmer and his target, a position roughly 10 to 12 feet from the muzzle of Slemmer's rifle. Slemmer and the game warden then

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[1]Montana amended its hunting laws in 1985 to include bison, statutorily referred to as "wild buffalo," among game animals subject to hunting, Mont. Code Ann. § 87-2-101(5), *amended*, 1985 Mont. Laws ch. 568, § 1, in response to the inability of officials of the National Park Service to control the migration from Yellowstone National Park into Montana of bison carrying the disease brucellosis. *See* Proceedings of Mont. Sen. Comm. on Fish & Game, Consideration of HB 763 (Mar. 12, Mar. 14, Mar. 21, and Mar. 26, 1985 (Mont. Legis. Council)). Brucellosis is a significant health hazard to domestic livestock. Montana cattle herds have been certified by the United States Department of Agriculture to be brucellosis-free. Loss of this designation would have significant detrimental impacts on Montana's cattle industry. *See Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400-02 (9th Cir. 1992). It was undisputed in the courts below that the hunt involved in this case was in all respects lawful under Montana's game laws.

proceeded to another area where Slemmer successfully killed a bison. Pet. App. 3a.

Petitioner states as fact in his petition that he said the words "Don't shoot" when he stood up in front of the muzzle of Slemmer's rifle. Pet. 4. The evidence presented in the state district court was in conflict with respect to the question of whether Petitioner said anything. Petitioner testified that he said the words "Don't shoot." Tr. 11. Game Warden Dave Etzwiler, an eyewitness in close proximity to the incident, denied that Petitioner said anything at all. Tr. 59, 63-64. Slemmer did not recall whether Petitioner spoke. Tr. 73. The Montana Supreme Court's recital of facts in its opinion makes no mention of Petitioner's alleged exclamation. Pet. App. 3a-4a. The court expressly found that Petitioner was not prosecuted for any expression or expressive conduct, but rather for his actions in placing his body between Slemmer and his target in such a way as to prevent the taking of the bison. Pet. App. 7a.

Petitioner was charged with the misdemeanor offense of hunter harassment in violation of Mont. Code Ann. § 87-3-143(3) (1989).[2] While the charges were pending in Justice Court, Petitioner filed a declaratory judgment action in the United States District Court for the District of Montana, seeking a declaration that the statute under which he was charged was unconstitutional. The Justice Court stayed proceedings pending the disposition of the federal suit. The federal district court dismissed the declaratory judgment complaint, holding that it should abstain from deciding the issue in deference to the pending State criminal proceedings. *Lilburn v. Racicot*, 855 F. Supp. 327 (D. Mont. 1991), *aff'd*, No. 91-35310 (9th Cir. July 13, 1992). Opp.

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[2]None of the other protestors was charged with an offense under the hunter harassment law arising from the events of March 13, 1990. There was no evidence in the record that law enforcement officers observed any other protestor interfering with a hunter about to shoot a bison, or engaging in any other conduct proscribed by Mont. Code Ann. § 87-3-142(3). There was evidence that protestors were observed by game wardens in possible violation of Mont. Code Ann. § 87-3-142(2), which prohibits herding of game animals to prevent a lawful hunt, Tr. 41-42, 50, but no charges were filed against any protestor under this subsection.

App. 1a. The Justice Court then denied Petitioner's motion to dismiss the complaint, and convicted him of the charge following a jury trial.

Petitioner appealed the conviction to State district court for trial de novo pursuant to Mont. Code Ann. § 46-17-311 (1991). The district court granted his motion to dismiss the complaint, holding that the statute under which he was charged was unconstitutionally overbroad and vague. Pet. App. 18a-30a. The State appealed the dismissal to the Montana Supreme Court, which reversed in a unanimous opinion, holding that the statute regulated "primarily conduct," Pet. App. 11a, and that to the extent it regulated expressive conduct or speech it did so without regard to communicative content. The court concluded that the statute withstood constitutional challenge under this Court's precedents dealing with facial overbreadth challenges to restrictions on speech and conduct, holding that any potential unconstitutional applications of the statute were speculative, and not "'substantial . . . judged in relation to the statute's plainly legitimate sweep.'" Pet. App. 8a-14a, *quoting Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The court rejected Petitioner's vagueness challenge, holding that the statute clearly applied to his conduct and accordingly that he lacked standing to challenge the statute for vagueness on its face. Pet. App. 16a-17a.[3]

[3]Although Petitioner includes a reference to vagueness in the question he presents, the petition contains no argument attacking the statute on vagueness grounds. Petitioner knew that interference with a lawful hunt was a violation of the statute. Tr. 15. This case does not present the vagueness issue Petitioner sought to argue in the Montana courts because, as the Montana Supreme Court found, a statute cannot be attacked on its face for vagueness by a party whose conduct clearly falls within the statute's prohibition. Pet. App. 16a-17a. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

SUMMARY OF ARGUMENT

1. There is no unacceptable conflict in lower court decisions which requires the exercise of this Court's jurisdiction in this case. Despite the fact that hunter harassment laws have been enacted in 48 states over the past ten years, there are only a handful of reported cases in which the constitutionality of the statutes has been tested. The cases that have stricken parts of other state laws involved statutes much different from the Montana statute at issue here. The lower courts are arriving at a level of consensus on the federal law issues presented by the few cases which have arisen, and this Court need not intervene at this time to provide guidance.

2. The Montana Supreme Court's decision is consistent with this Court's holdings and presents no important First Amendment issue. Petitioner's arguments proceed from a misreading of the statute and misapply or ignore the controlling decisions of this Court. The Montana statute is content-neutral because it does not facially discriminate among messages based on their content and it is justified by a non-content based legislative purpose--to prevent interference with lawful hunting activities, promote safety, and avoid dangerous confrontations between hunters and persons attempting to prevent hunting. The Montana court's decision correctly applied the principles of substantial overbreadth, holding that any hypothetical unconstitutional application of the statute would not be "real and substantial, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

REASONS FOR DENIAL OF THE PETITION

I. The Decisions of Other Lower Courts Are Not Inconsistent With the Montana Supreme Court's Decision in This Case.

Petitioner asserts that lower courts are divided on the issue presented in this case, and suggests that it is necessary for this Court to grant the writ to resolve these conflicts. The lower court decisions Petitioner cites involve statutory provisions which differ in material ways from the Montana law at issue in this case, and the treatment of those statutes by other lower courts is largely consistent with the Montana Supreme Court's decision here.

Dorman v. Satti, 862 F.2d 432 (2d Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989), involved a Connecticut statute which had several parts. Like the Montana statute, it prohibited interference with a lawful hunt in progress. The statute went further, however, and also prohibited interference with "acts in preparation" for the lawful taking of an animal. The Second Circuit Court of Appeals upheld a federal district court's decision holding the statute overbroad insofar as it reached these "acts in preparation." Such acts could occur far from the field where the actual hunt would take place and could include, according to the reading of the Court of Appeals, such acts as "'buying supplies long before the actual hunt takes place . . . ; consulting a road map . . . ; making plans during a workplace coffee break; or even getting a good night's sleep before embarking on a hunting trip.'" 862 F.2d at 437, *quoting Dorman v. Satti*, 678 F. Supp. 375, 383 (D. Conn. 1988).

Significantly, the court of appeals in *Dorman* left undisturbed the federal district court's discussion of statutes such as the Montana law, which reach only conduct occurring in the field in the course of a lawful hunt. The Connecticut federal district court opined that a state clearly had the power to proscribe interference with hunters in the field during a lawful hunt, even when the interference was accomplished through what otherwise would be protected speech. 678 F. Supp. at 383.

Following the court of appeals' *Dorman* decision, the Connecticut legislature amended the Connecticut statute to delete the prohibition of interference with "acts in preparation" for a lawful hunt. Conn. Gen. Stat. § 53a-183a (1990). In *State v. Ball*, 627 A.2d 892, 897 (Conn. 1993), the Connecticut Supreme Court considered the amended statute, which is in many respects similar to Mont. Code Ann. § 87-3-142(3), and held that it was not a content-based restriction on speech.[4]

The Court need not grant the writ in this case to reconcile the Montana Supreme Court's decision with *Dorman*. The statute at issue in *Dorman* was materially different from the one involved in this case. Mont. Code Ann. § 87-3-142(3) (1989), unlike the Connecticut statute at issue in *Dorman*, has been definitively construed by the state supreme court to reach "only activities which occur in the field during an otherwise lawful hunt." Pet. App. 11a. The Montana statute thus does not suffer from the geographical and temporal breadth which led the courts to invalidate the Connecticut statute. Because it is limited in its scope to the course of an actual hunt in the field, it cannot be properly applied to "acts in preparation" occurring at other times and places. The federal district court's decision in *Dorman*, which the court of appeals left undisturbed, recognized that regulations such as the Montana statute are not unconstitutionally overbroad.[5]

Finally, the Court should disregard any tension between the Montana Supreme Court's decision in this case and the decision in *Dorman*. The amendment of the Connecticut statute has rendered the narrow holding in *Dorman* moot, since the

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[4]*Ball* remains in litigation in the Connecticut courts. The Connecticut Supreme Court remanded the case for further evidentiary hearings on the nature of the State's interest in regulating interference with sport hunting and on the nature of the forum involved. 627 A.2d at 899.

[5]The United States District Court for the District of Montana distinguished *Dorman* on these grounds in rejecting Lilburn's complaint for declaratory judgment. *Lilburn v. Racicot*, 855 F. Supp. 327, 329-30 (D. Mont. 1991), *aff'd*, No. 91-35310 (9th Cir. July 13, 1992). Opp. App. 6a-7a.

statute the court of appeals considered no longer exists. Moreover, *Dorman*'s analysis of the First Amendment issues presented is clearly wrong in light of this Court's cases. The Second Circuit apparently felt the Connecticut statute could be considered content-based for no other reason than that its effects fell more heavily on those opposed to sport hunting than on others. 862 F.2d at 437. This Court has consistently rejected similar arguments. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (regulation of rock music performances held content-neutral); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (ordinance zoning theaters based on content of films held content-neutral). The recent trend of decisions involving hunter harassment statutes in various states has been consistent with the analysis of the Montana Supreme Court on this key question. *State v. Casey*, 876 P.2d 138, 139-40 (Idaho 1994) (Idaho hunter harassment law held content-neutral); *Ball*, 627 A.2d at 897-98 (amended Connecticut statute held content-neutral).[6]

Petitioner's assertion that the Idaho Supreme Court's decision in *Casey* conflicts with the decision in this case is also wrong. The statute at issue in *Casey*, like the Connecticut statute at issue in *Dorman*, was not limited in its application to conduct which actually interferes in the field with the completion of a lawful hunt. Casey was charged under a subsection of the Idaho hunter harassment law which made it a misdemeanor to "[e]nter or remain in any area where any animal may be taken with the intent to interfere with the lawful taking or pursuit of wildlife." Idaho Code § 36-1510(1)(c). No similar provision is found in the Montana hunter harassment law. The Idaho court hypothesized that the Idaho statute could be violated by someone who "might enter an area where wildlife could be legally hunted and do nothing more than announce his opposition to hunting and his intention to interfere with such taking." 876 P.2d at 140. In contrast, the Montana Supreme Court held in this case that

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[6]In addition to these reported cases, the Kentucky hunter harassment law has been sustained against a First Amendment challenge in an unreported decision, *Barker v. Commonwealth*, No. 92-CA-2518-DG (Ky. Ct. App. Feb. 18, 1994).

violation of Mont. Code Ann. § 87-3-142(3) required actual disturbance of a lawful hunt. Pet. App. 10a-11a. The Idaho court recognized the distinction between the provision at issue in *Casey* and statutes such as Montana's by severing the subsection at issue from the Idaho statute and leaving in effect provisions similar to Montana's which require proof of actual disturbance of a lawful hunt. *Id.* at 141.

In addition to *Dorman* and *Casey*, Petitioner cites *Opinion of the Justices*, 509 A.2d 749 (N.H. 1986), as a state court decision alleged to conflict with the decision in this case. Pet. 12, n.5. The New Hampshire opinion considered only the question of the constitutionality *under the New Hampshire constitution* of a proposed hunter harassment law. The court expressly declined to reach the issue of the proposed legislation's validity under the First Amendment. 509 A.2d at 753. A conflict between the Montana Supreme Court's decision on an issue of federal law and the New Hampshire Supreme Court's decision on a similar state law issue is not grounds for exercise of this Court's jurisdiction. Sup. Ct. R. 10.1(b) (certiorari may be appropriate "[w]hen a state court of last resort has decided a *federal question* in a way that conflicts" (emphasis added)). Moreover, the New Hampshire opinion was an advisory one, issued in advance of the enactment of the provision at issue. The court did not discuss or apply the rule of *Broadrick* that a statute may be held facially unconstitutional under the First Amendment only if its potential unconstitutional applications are "real and substantial." 413 U.S. at 615. The issue decided by the Montana Supreme Court in this case--whether the statute is facially overbroad under *Broadrick*--was not presented or decided in the New Hampshire case.

Petitioner asserts that review by this Court of the question presented "would be of tremendous value to state and federal courts." Pet. 13. To the contrary, given the widespread enactment over the past ten years of hunter harassment laws throughout the country, it is remarkable that very few reported cases exist in which the statutes have been challenged. The state and lower federal courts do not appear to be struggling with these cases, and the recent decisions are arriving at a level of consensus with respect to the federal law issues involved. The different

outcomes in the various cases are attributable more to the variances in statutory approach from state to state than to any widespread uncertainty about the controlling federal law principles. These statutory variations make a decision by this Court in this case of limited value to lower federal courts and courts in other states.

Petitioner has cited no case in which a statute similar to the one at issue in this case has been held facially overbroad in violation of the First Amendment. In the absence of conflicting decisions considering similar statutes, the Court should deny the writ in this case.

II. The Montana Supreme Court's Decision Is Consistent With This Court's Precedents and Does Not Warrant Review.

A. The Montana Supreme Court's holding that the statute is content-neutral is consistent with this Court's precedents.

Petitioner argues that the Montana Supreme Court's determination that the statute is content-neutral is inconsistent with established First Amendment principles. This argument should be rejected because it relies on a misinterpretation of the statute and misreads this Court's decisions.

Petitioner asserts that the statute "is *expressly* directed at actions taken and statements made with the 'intent to dissuade' the listener from hunting." Pet. 13 (emphasis Petitioner's). While he carefully adds the words "actions" and "conduct" to his discussion, Petitioner's argument is premised throughout on the idea that the statute is designed to regulate speech, asserting, for example, that it "focuses on one particular form of 'disfavored speech,'" Pet. 14. A reading of the statute as a whole dispels the notion that the statute deals exclusively, or even extensively, with speech.

Petitioner assiduously avoids quoting the statute accurately, preferring to paraphrase its terms out of context. The statute does not punish speech qua speech, and it makes no reference to the intent to dissuade anyone "from hunting." The

conduct prohibited by the statute is the act of "disturbing" a person engaged in a lawful hunt. For purposes of the statute, "disturb" must be given the meaning used by the Montana Supreme Court in its opinion, *viz.*, to interfere with or interrupt, Pet. App. 13a, *see Webster's New Collegiate Dictionary* 333 (1977 ed.).[7] Although the legislature, to avoid application of the statute to accidental or inadvertent intrusions, defined the specific intent required to make such a disturbance criminal--"intent to dissuade the individual or otherwise prevent the taking of the animal"--the prohibition of harassment is primarily directed at conduct which actually disturbs a lawful hunt in progress with the intent to prevent the taking of an animal.

Concededly, an "intent to dissuade or otherwise prevent" a hunter from completing a hunt may arise from a defendant's philosophical opposition to hunting. However, as the Montana Supreme Court found, Pet. App. 13a, the intent can also arise from other attitudes, including the desire of the defendant to take the animal which the victim intends to take.[8] To the extent expressive conduct is relevant in a prosecution under the statute at all, the applicability of the statute does not depend on the kind of expressive conduct in which the defendant engaged. *Id.*

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[7]For this reason, among others, Petitioner's reliance on *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), is misplaced. In that case, the Court invalidated an ordinance which made it a crime to engage in expressive conduct "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race." The ordinance, unlike the Montana statute, discriminated against expression based on the ideas conveyed, and it criminalized expression based on the listener's subjective reaction. To violate the Montana statute, the defendant need not engage in expressive conduct at all, and the State need not prove that the victim reacted to the defendant's conduct in any way.

[8]*Compare, e.g., Dorman*, in which the plaintiff was originally prosecuted for attempting to talk a hunter out of hunting game birds, *with Barker v. Commonwealth*, No. 92-CA-2518-DG, slip op. at 3 (Ky. Ct. App. Feb. 18, 1994), in which the defendant asserted that he interfered with a deer hunter, not out of any philosophical dislike of hunting, but rather with the intention of driving deer from a vineyard to prevent damage to the trees. Slip op. at 3.

Interference by communication of any message, or no message at all, would be equally culpable, if accompanied by the requisite intent.

Petitioner asserts that the statute is content-based because speech of a certain content is more likely than other kinds of speech to evidence an intent to dissuade or prevent. Pet. 16 ("[t]he 'content of what was said' to a hunter will obviously be crucial to any determination of whether an individual had the requisite 'intent to dissuade'"). But this Court has expressly rejected the idea that the use of statements to prove intent violates the First Amendment. In *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2201-02 (1993), the Court sustained a Wisconsin statute providing an enhanced penalty for bias-motivated crimes, disregarding arguments that the statute violated the First Amendment because a defendant's biased statements would be the best evidence of the proscribed motivation. Similarly, reliance on a defendant's statements in determining whether he or she intended to dissuade or prevent under this statute would not violate the First Amendment or render the statute overbroad.

The second reason for rejecting Petitioner's arguments is that they misapply this Court's decisions. Under this Court's precedents, a statute may be found content-based if it facially discriminates against speech of a certain content or if the statute was enacted with the aim of promoting or inhibiting speech of one content rather than speech of another. *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994). The above discussion demonstrates that a fair reading of the statute dispels the assertion that it fails the first prong of this test. Petitioner's reliance on *Turner Broadcasting* for the proposition that a content-neutral purpose cannot save a law that discriminates on its face based on content is therefore inapposite.

As to the second prong of the test, Petitioner appears to concede, Pet. 16-17, that the Montana Supreme Court accurately found that the legislature's intent in the enactment of the Montana statute was not to suppress speech, but to promote safety and avoid dangerous encounters between hunters and persons intending to interfere with them. Pet. App. 12a-13a. However, in citing cases such as *City of Houston v. Hill*, 482 U.S. 451 (1987), and *Boos v. Barry*, 485 U.S. 312 (1988), Petitioner

incorrectly assumes that the danger against which the Montana legislature wished to guard arises solely from the risk that hunters would be offended by speech and intentionally seek to injure protestors. To the contrary, the Montana legislature, fully familiar with the conditions which would exist in the field, was well aware that persons who intentionally interfered with an ongoing hunt were at great risk of accidental injury.

Montana law requires hunters to take precautions against their misidentification as a target. Hunters are required to wear orange clothing in the field, Mont. Code Ann. § 87-3-302 (1993), and young hunters receive training in firearm safety with the objective, among others, of avoiding conduct which brings hunters into each other's line of fire. *See* Mont. Code Ann. § 87-2-105 (1993). No such requirements apply to persons who go into the woods for the purpose of interfering with a hunt. Such persons frequently engage in unsafe conduct as part of their interference activities. *See* Sean P. Durrant, Comment, *Wyoming's Hunter Interference Law--Anarchy in the Woods: How Far Afield Does the Right to Free Speech Extend?*, 27 Land & Water L. Rev. 505, 505-07 & n.3 (1992) (describing documented examples of confrontations between hunters and protestors in the field). The facts of this case clearly demonstrate that the legislature's concern was grounded in fact. Petitioner came within a split second of being shot at close range with a high-powered rifle, not because Hal Slemmer was offended by any speech Petitioner uttered but because of Petitioner's own foolhardy behavior in stepping in front of a hunter about to make a shot.

Legislative intent to avoid such dangerous events, and to allow hunters to hunt without interference, are content-neutral motivations. The legislature recognized that debate would occur regarding the sport of hunting. It restricted that debate only insofar as it both occurred at a time and place presenting, in the legislature's judgment, unacceptable risk to persons in the field and interfered with lawful activities occurring there. Such a statute, regulating narrowly in a nonpublic forum, does not violate the First Amendment. *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2708-09 (1992). The Montana Supreme Court's decision sustaining the statute is fully

consistent with the controlling decisions of this Court involving similarly motivated laws, *e.g., Ward* and *Playtime Theatres*, with decisions dealing with statutes restricting speech as to time, place, or manner, *e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), and decisions dealing with regulatory schemes operating in a nonpublic forum, *e.g., Lee*, 112 S. Ct. at 2708-09; *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985).[9]

B. The Montana Court's finding that the statute is not substantially overbroad does not warrant this Court's review.

A determination of whether the decision in this case warrants review demands a discussion of the governing principles in a facial overbreadth analysis. Petitioner, however, does not cite the seminal overbreadth case, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and does not state the governing principles announced in that case and reiterated by this Court as recently as the decision in *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2400-01 (1992).

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[9]Almost without exception, the cases Petitioner cites involved burdens directed at the press, *e.g., Turner Broadcasting* and *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), or restrictions on speech in traditionally public fora such as public streets, *Madsen v. Women's Health Ctr.*, 114 S. Ct. 2516 (1994); *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395 (1992); *Burson v. Freeman*, 112 S. Ct. 1846 (1992); *Boos v. Barry*, 485 U.S. 312 (1988); *City of Houston v. Hill*, 482 U.S. 451 (1987). In this case, Petitioner made no showing that national forests and other areas where sport hunting occurs are dedicated, either by tradition or government fiat, to use as a forum for expressive conduct. The only argument advanced by Petitioner in this regard in the courts below was that the places were areas where the public was allowed to go, a rationale which this Court has consistently rejected as a sole basis for a claim that a forum is a public one for First Amendment purposes. *United States v. Grace*, 461 U.S. 171, 177-78 (1983), *quoting Adderley v. Florida*, 385 U.S. 39, 47-48 (1966). The burden of proof on this issue was on Petitioner, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984), and he failed to carry it.

Under *Broadrick*, a person, such as Petitioner,[10] whose conduct is not protected by the First Amendment is nevertheless allowed to challenge a statute on First Amendment grounds because the Court has recognized that some statutes sweep so broadly that their very existence can stifle significant amounts of protected speech. *Broadrick*, 413 U.S. at 611-12. However, a person whose conduct is not constitutionally protected must show more than that a statute has hypothetical unconstitutional applications. Since facial overbreadth is "manifestly strong medicine . . . employed by the Court sparingly and only as a last resort," *id.* at 613, a person alleging facial overbreadth must show that the statute's potential unconstitutional applications are "not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. "In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

Beyond disagreeing with the Montana Supreme Court's conclusions, Petitioner never explains in what respect the court's decision is unfaithful to these principles. He simply argues that the rules which require a police officer on a city street to tolerate "a significant amount of verbal criticism," *Hill*, 482 U.S. at 461, somehow create a constitutional privilege to interfere with a lawful hunt by a private citizen on lands where such activity is expressly permitted. *Hill* announces no doctrine leading to such a conclusion.

The ordinance at issue in *Hill* made it unlawful to "in any manner oppose, molest, abuse, or interrupt any policeman in the

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[10]As the Montana Supreme Court specifically found, Petitioner did not argue in the courts below that his conduct in this case constituted "speech" protected by the First Amendment. Pet. App. 7a ("Lilburn . . . does not contend that his own conduct, which forms the basis of the charges brought against him, was constitutionally protected"). Although the petition is far from clear on this point, it makes, and indeed could make, no cogent argument that the First Amendment protects Petitioner's right to stand up in front of a hunter and prevent him from making a shot.

execution of his duty." This Court struck the ordinance, in part because "the First Amendment protects a significant amount of verbal criticism and challenge *directed at police officers*." 482 U.S. at 461 (emphasis added.) The Court invalidated the ordinance for two reasons: (1) It criminally proscribed verbal conduct toward police officers which is constitutionally protected, *id.* at 462; and (2) it gave police officers unbridled discretion in determining what conduct violates the ordinance, *id.* at 465-66.

Petitioner reads into *Hill* a constitutional right to subject hunters to "criticism and challenge," at least while hunting on public lands, and in the course of doing so to interfere with the hunters' lawful activities. Of course, the Montana statute as construed by the Montana Supreme Court does not prohibit such "challenge and criticism," except in those circumstances when it actually and intentionally disturbs a hunt. This Court recognized in *Lee* that such a restriction does not violate the First Amendment. Moreover, the City of Houston did not even attempt to justify the ordinance as a legitimate time, place, or manner restriction. No such argument could plausibly be made, since the ordinance applied throughout the city and at all times. The Montana statute, in contrast, only operates during limited times and in places where a lawful hunt is occurring. *Hill* is therefore not in point.

Petitioner next argues that the Montana statute "essentially 'forecloses an entire medium of expression'." Pet. 19. This argument is virtually incomprehensible. The cited authority, *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994), dealt with an ordinance prohibiting exhibition of residential yard signs. How that case applies here is never explained in the petition. However, this Court has quite clearly rejected Petitioner's "medium is the message" argument. Pet. 19. The First Amendment does not create a right of access to the most efficient, effective, or "poignant" forum for speech. "The First Amendment does not demand unrestricted access to a nonpublic forum merely because that forum may be the most efficient means of delivering the speaker's message." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 809 (1985).

Petitioner's reliance on the Court's recent decision in *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994), is

also misplaced. That case involved an injunction against certain activities of protestors at abortion clinics. As the Court's opinion makes clear, several factors distinguish this case. First, the injunction prohibited speech in "a traditional public forum," *viz.*, a city street, not in a national forest which has not been shown to be a public forum by tradition or designation. *Id.* at 2524. Second, the Court found that heightened scrutiny was appropriate because the restraint at issue was an injunction, rather than a statute like the one at issue here. *Id.* at 2525. Finally, the provision at issue in *Madsen* prohibited *all* unsolicited approaches by the persons subject to the injunction. The statute at issue here, in contrast, prohibits only conduct which disturbs the lawful activities of hunters, leaving a wide area in which a protestor's conduct or communication is unaffected by the statute.

The Montana Supreme Court found that the potential for unconstitutional application of the statute was far exceeded by the statute's legitimate sweep. Pet. App. 14a. Petitioner does not challenge this conclusion, preferring to ignore the requirements for "substantial overbreadth" in favor of a series of overstated assertions of the statute's supposed infirmity.[11] Unlike Petitioner's arguments, the Montana court's application of the overbreadth test is faithful to this Court's precedents. It does not warrant certiorari review.

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[11]For example, Petitioner's assertion that the Montana statute, "in effect, renders vast amounts of *public land* off limits to First Amendment speech and conduct" (emphasis Petitioner's) is pure hyperbole. First, public lands being used for hunting are not well suited for exchange of ideas, as Petitioner recognized in his testimony in this case. Tr. 11, 23. Second, the statute can only apply during those limited times when hunting is in season. Speech and conduct at other times are unaffected by the statute. Third, not all First Amendment speech and conduct will disturb a lawful hunt. Speech and conduct that do not are unaffected by the statute. Fourth, actual hunts occur on a very small percentage of the public land at any given time. Speech and conduct in areas where a hunt is not in progress are unaffected by the statute.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

JOSEPH P. MAZUREK
Attorney General
CHRISTIAN D. TWEETEN*
Chief Deputy Attorney General
CLAY R. SMITH
Solicitor
State of Montana
Justice Building
P.O. Box 201401
Helena, MT 59620-1401
(406)444-2026

*Counsel of Record

November 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

* * *

JOHN LILBURN,

Plaintiff,

-v-

MARC RACICOT, Attorney general of Montana; MIKE SALVAGNI, Gallatin County Attorney; K.L. COOL, Director of Montana Department of Fish, Wildlife and Parks; GEORGE HUBBARD, Warden Captain Montana Department of Fish, Wildlife and Parks,

Defendants.

CV 90-56-M-CCL

ORDER
(Filed
Jan. 22, 1991)

* * *

BACKGROUND

On March 13, 1990, Gallatin County Attorney Mike Salvagni, filed a complaint against John Lilburn in Gallatin Justice Court on behalf of the State of Montana alleging that John Lilburn committed the offense of harassment, a misdemeanor offense, in violation of Montana Code Annotated 87-3-142(3). The complaint alleges that John Lilburn purposely or knowingly disturbed an individual engaged in the lawful taking of a wild animal, specifically a buffalo which had traveled beyond the boundaries of Yellowstone National Park. The complaint states that Lilburn disturbed the hunter with the intent to

dissuade or otherwise prevent the taking of the buffalo when Lilburn placed himself between the buffalo and the hunter who was aiming a loaded rifle at the buffalo.

Following the filing of the complaint in Gallatin County Justice Court, Lilburn filed this action against the Attorney General, the Gallatin County Attorney, and the Department of Fish, Wildlife, and Parks alleging his civil rights were violated when he was arrested by state officials for violating an allegedly unconstitutional state law. Plaintiff Lilburn states the Hunter Harassment Act is unconstitutionally vague in that it fails to define prohibited conduct with any degree of specificity and is overbroad in that it forecloses his right to exercise free speech in violation of the First Amendment. Plaintiff seeks declaratory judgment that the Act is unconstitutional on its face or is unconstitutionally applied against him; injunctive relief restraining defendants from enforcing the act; and recovery of attorney's fees pursuant to 42 U.S.C. § 1988.

Defendants move to dismiss the complaint in federal court on the grounds that the federal court should abstain from interfering in an ongoing state criminal action. Plaintiff opposes the motion on the grounds that the Hunter Harassment Act is so clearly unconstitutional on its face that the federal court should intervene; that the justice court is an improper forum in which to consider a constitutional issue; and that forcing him to litigate this issue through the state court system will cause considerable delay and inconvenience.

Although abstention from the exercise of federal jurisdiction is the exception, not the rule, *Colorado River*

Conservation District v. United States, 424 U.S. 800, 813, (1986), abstention is appropriate if (1) there are pending state judicial proceedings, (2) the state proceedings implicate important state interests, (3) and the state proceedings provide an adequate opportunity to raise federal questions. *Younger v. Harris*, 401 U.S. 37 (1971). However, federal intervention may be warranted if petitioner can show he comes within the special circumstances exception to *Younger* such as proven harassment by state officials, bad faith prosecutions, or extraordinary circumstances such that petitioner would suffer irreparable injury if the federal court did not intervene. *Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

Here, Plaintiff Lilburn focuses on the third prong of *Younger* arguing that the defendants fail to show the state proceedings provide an adequate opportunity to raise federal questions. Plaintiff suggests that the justice court where he is being prosecuted for the misdemeanor criminal offense is an inappropriate forum in which to consider constitutional questions and argues that the Montana Supreme Court has so found in *State v. Tollefson* ___ Mont. ___, 780 P.2d 621 (1989).

In *Tollefson*, the State moved for a writ of supervisory control after the Justice Court found unconstitutional the statute which provides for a rebuttable presumption on blood alcohol content in a DUI case. In *dicta*, the court pointed out that review of a constitutional question in this particular case was difficult because there was no court record and therefore questioned whether a justice court can be a proper forum for a consideration of the constitutionality of a statute. The Montana Supreme Court reviewed the Justice Court's ruling and reversed.

Significantly, the court stated that because its ruling was for the purposes of this case only, the issue could be raised again in the event the defendant was convicted and obtained a de novo trial in district court.

Tollefson is not persuasive on the issue of whether a justice court provides an adequate opportunity to raise a constitutional issue. The language relied upon is *dicta* and the court specifically pointed out defendant could raise the issue again in district court. Plaintiff complains that such interpretation of *Tollefson* will force him to appeal to the state district court, and state Supreme Court in order to reach federal court. Cost, anxiety, and inconvenience of having to defend against a state prosecution, however, does not preclude a federal court from abstaining from interfering in a state prosecution. *Younger*, 401 U.S. 37, 46 (1971). Moreover, a state has a special interest in enforcing its own laws in its own courts. Officers of the State "are charged with the duty of prosecuting the laws of the State and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statue [sic], unless it plainly appears that this course would not afford adequate protection." *Id.* at 45.

Finally, the very problem of which plaintiff complains, exhausting the state process first before reaching the federal forum, is at the heart of the abstention doctrine. As the Supreme Court has stated:

> "*Younger* and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances. . . . . The notion of

> 'comity' includes 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.'. . . . Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights. *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423 (1982).

Here, Plaintiff Lilburn is presuming that the state's process will not protect his constitutional rights merely because he is in justice court. He further presumes some higher state court will not agree with his arguments on the constitutionality of the Hunter Harassment Act. Such presumptions are not warranted. Montana Judges, including justices of the peace, are subject to and bound by the federal constitution. *Pennzoil v. Texaco,* 107 S.Ct. 1519, 1528 (1987).

Plaintiff also argues that because the Montana statute is so plainly unconstitutional on its face, federal intervention is warranted to stop the state from infringing upon his constitutionally protected right of free speech. The court disagrees. Hunting is a legitimate activity which the state may protect in any reasonable and constitutionally permissible manner. Although the statute may inhibit speech to some limited degree, it also protects hunters and those opposed to hunting from the very kind of harm which may have occurred when the plaintiff stepped in front of the hunter, who was pointing a loaded rifle at a

bison. The goal of the statute is clearly reasonable. "The existence of a 'chilling effect', even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but – while regulating a subject within the State's power – tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so." *Younger* at 51 (citations omitted). Here, regulating hunting, including interference with hunting, is clearly within the State's power.

Plaintiff points out that at least one Court of Appeals has declared a hunter harassment statute unconstitutional because it interfered with free speech. *Dorman v. Satti*, 862 F.2d 432 (2nd Cir. 1988) However, in *Dorman*, there was no pending state action as here, and hence the court was not faced with interfering with an ongoing criminal prosecution. Moreover, the statute involved in *Dorman* prohibited persons from interfering with another person who was taking or *preparing to take* wildlife. The court found such language too broad because the clause "preparing to take" could be construed to encompass buying supplies long before the actual hunt takes place, consulting a road map, making plans during a workplace coffee break, or even getting a good night's sleep before embarking on a hunting trip. *Id.* at 437 (quoting district court's opinion). The particular subsection under which plaintiff Lilburn is charged, however, contains no such language but rather proscribes behavior which interferes with an individual

actually engaged in the lawful taking of a wild animal. Mont. Code Ann. § 87-3-142 (3).

Plaintiff has not attempted to exhaust his remedy under state law, and has not established the "special circumstances" required for federal intervention. Accordingly, this court is prohibited by principles of comity from considering his claim and request for relief.

IT IS THEREFORE ORDERED that defendants' motion to dismiss is GRANTED.

The Clerk shall forthwith notify counsel of entry of this order.

Done and dated this 22 day of January, 1991.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

(3)

SUPREME COURT, U.S.
FILED
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No. 94-723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN LILBURN,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

PETITIONER'S REPLY BRIEF

Eric R. Glitzenstein
(Counsel of Record)
Katherine A. Meyer

Meyer & Glitzenstein
1601 Connecticut Ave., N.W.
Suite 450
Washington, D.C. 20009-1035
(202) 588-5206

Attorneys for Petitioner

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I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE SPLIT IN THE LOWER COURTS REGARDING THE COMPATIBILITY OF "HUNTER HARASSMENT" LAWS WITH THE EXERCISE OF FIRST AMENDMENT RIGHTS.

Respondent acknowledges the "widespread enactment over the past ten years of hunter harassment laws throughout the country" (Opp. 10), and also that various lower courts have split regarding the consistency of these laws with First Amendment priniciples (Opp. 7-10). Nevertheless, the State insists that review is not appropriate because the "lower court decisions . . . involve statutory provisions which differ in material ways from the Montana law at issue in this case . . . ."

(Opp. 7). This argument does not afford a basis for denying the petition for several reasons.

First, whatever the differences between various "hunter harassment" statutes, respondent itself concedes that there is "tension" between the lower courts as to how the constituitonality of these laws should be analyzed (Opp. 8). Indeed, the State even finds it necessary to maintain that the Second Circuit's "analysis of the First Amendment issues presented is clearly wrong" — particularly that court's critical finding that the Connecticut hunter harassment statute was content-based because it was aimed at those opposed to sport hunting. Opp. 9, *citing Dorman v. Satti*, 862 F.2d 432 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989). That attack on the Second Circuit's reasoning — whether valid or not — is tantamount to a concession that there is indeed an irreconcilable conflict between the Second Circuit's approach and that pursued by the Montana Supreme Court here.

Second, to the extent that there are any "material" differences between the statutes considered by the lower courts, those differences do not strengthen respondent's position. As discussed previously, if anything, the hunter harassment provisions invalidated by the Second Circuit and the Idaho Supreme Court (and declared to be objectionable by the New Hampshire Supreme Court) were *less* constitutionally suspect than the law at issue.

Indeed, as respondent acknowledges, the Idaho Supreme Court struck down a hunter harassment prohibition — although it was *not* deemed to be content-based — because the "Idaho statute could be violated by someone who 'might enter an area where wildlife could be legally hunted and do nothing more than announce his opposition to hunting and his intention to interfere with such taking.' " Opp. 9 (emphasis added), *quoting State v. Casey*, 876 P.2d 138, 140 (Idaho 1994).

The statute at issue here, however, sweeps even more broadly — it criminalizes *any* conduct or speech which merely "disturb[s] an individual engaged" in hunting, trapping, or "pursuing" a wild animal — and suffers the added constitutional infirmity of being explicitly viewpoint-based, *i.e.*, by targeting "disturbing" speech or conduct that is made with the "intent to dissuade."

In short, there is simply no coherent way in which the Montana Supreme Court's ruling can be reconciled with that of the Idaho Supreme Court or any of the other courts which have perceived First Amendment flaws in hunter harassment laws. Far from "arriving at a level of consensus with respect to the federal law issues involve[d]," as alleged by respondent (Opp. 10), the lower courts are in fundamental disgreement regarding the constitutionality of "hunter harassment" prohibitions. Therefore, guidance by this Corut on the federal constitutional questions involved is appropriate.

II. THE MONTANA SUPREME COURT'S RULING RAISES IMPORTANT FIRST AMENDMENT QUESTIONS THAT WARRANT REVIEW

Respondent asserts that review is improper because the State of Montana enacted a "non-content based" statute which is designed essentially to prevent physical "interference with lawful hunting activities . . .." (Opp. 6). However, as even a cursory review of the statute discloses, that argument is disingenuous.

Thus, while one subsection of Montana's hunter harassment law *does* provide that "[n]o person may intentionally interfere with the lawful taking of a wild animal by another," MCA § 87-3-142(1), that is *not* the subsection under which petitioner was charged and convicted. Rather, *in addition to* prohibiting

"intentional interverence with the lawful taking of a wild animal," *id.*, the Montana Legislature *also* made it an offense to "*disturb* an individual" engaged in hunting or trapping activities "with *intent to dissuade*" the individual from "taking" the animal. MCA § 87-3-142(3) (emphasis added).

This additional prohibition — which was invoked against petitioner here — furthers no independent, legitimate interest of the State. Thus, as respondent tacitly concedes, the provision's only incremental effect is to criminalize speech and expressive conduct that do *not* rise to the level of actual physical "interference" but, rather, merely "disturb" persons engaging in hunting and trapping by exposing them to " 'verbal criticism and challenge.' " Opp. 18, *quoting City of Houston v. Hill*, 482 U.S. 451, 461 (1987). Under respondent's own analysis, therefore, it is evident that the provision's "potential unconstitutional applications" are indeed "substantial" when "judged in relation to the statute's . . . legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *see also Texas v. Johnson*, 491 U.S. 397, 410 (1989) (Texas statute forbidding desecration of the flag was not necessary to keep the peace because the state "already has a statute specifically prohibiting breaches of the peace.").[1]

[1]Respondent's rebuttal to petitioner's overbreadth argument is also based on a flagrant misreading of the statute. As noted, respondent acknowledges that the provision may criminalize " 'challenge and criticism' " directed at hunters, Opp. 17, *quoting City of Houston v. Hill, supra*, 482 U.S. at 461, but asserts that the provision only "prohibit[s] such 'challenge and criticism' . . . in those circumstances when it actually and *intentionally disturbs a hunt.*" Opp. 17 (emphasis added). But that is not what the law says; rather, as acknowledged by the Montana Supreme Court, the statute proscribes any " 'disturbance' *of a hunter* . . . when it is done with the intent to either *dissuade the hunter or to prevent the taking of the animal.*" App. 13a (emphasis added). Obviously, the overwhelming majority of speech and expressive conduct by groups and individuals opposed to hunting is likely to be "disturbing" to hunters, and hence the statute "significantly compromise[s] recognized First Amendment protections of parties not before the Court . . . ." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

Defendants' arguments as to why the provision is not content-based are also without merit. Contradicting the Montana Supreme Court's reasoning — which focused exclusively on the purported "governmental purpose" underlying the provision, App. 12a — respondent concedes that, irrespective of its underlying motivation, a "statute may be found content-based if it *facially discriminates* against speech of a certain content . . .." Opp. 13 (emphasis added). Yet, remarkably, the State insists that a provision which selectively singles out for punishment speech or expressive conduct that is "disturb[ing]" to hunters when accompanied by the "intent to dissuade" them is not, on its face, content-based. *Id.*[2]

That position simply cannot be reconciled with this Court's recent precedents, which confirm that the "First Amendment does not permit [a] governmental entity to impose special prohibitions on those speakers who express views on disfavored subjects." *R.A.V. v. St. Paul,* 112 S. Ct. 2538, 2547 (1992). Indeed, while asserting that the "applicability of the statute does not depend on the ***kind*** of expressive conduct in which the defendant engaged" (Opp. 12) (emphasis added), respond-

---

[2]Petitioner does not "concede . . . that the Montana Supreme Court accurately found that the legislature's intent . . . was not to suppress speech . . .." Opp. 13. To the contrary, in view of its simultaneous adoption of a sweeping prohibition on "intentional interference" with hunting and trapping, the Montana legislature's only conceivable purpose in further proscribing conduct and speech that "disturbs" hunters and is accompanied by the "intent to dissuade," was to suppress speech by persons who, to use respondent's characterization, have a "philosophical opposition to hunting." Opp. 12. In particular, contrary to the respondent's assertion, there is no evidence in the record that the legislature was concerned with preventing hunters improperly from taking animals from each other. *Id.* In any event, there is no need for the Court to even attempt to fathom the Montana legislature's underlying intent since the provision at issue "on its face[] discriminates based on content." *Turner Broadcasting System Inc. v. Federal Communications Commission,* 114 S. Ct. 2445, 2459 (1994).

ent does not and cannot deny that the provision under which Mr. Lilburn was convicted may not, as written, be applied to persons who engage in speech and expressive conduct — no matter how disruptive — with the objective of *encouraging* a hunter to kill an animal.

Thus, under the Montana law, a pro-hunting group may hold up signs in a national forest virulently attacking persons opposed to hunting on environmental or ethical grounds, yet an animal protection or conservation group would be prohibited from holding up a sign of identical size with the opposite message, so long as it had the effect of "disturbing" hunters. Plainly, however, Montana "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules." *R.A.V, supra,* 112 S. Ct. at 2548.[3]

[3]The State's reliance on *Wisconsin v. Mitchell*, 113 S.Ct. 2194 (1993), is misplaced and simply highlights why review is appropriate here. *Mitchell* did not involve a statute that proscribed the expression of one particular viewpoint on a question of public policy but, rather, merely authorized an enhanced penalty when *an otherwise illegal act* was undertaken with a race-based motive. Distinguishing the statute involved in *R.A.V.* — which was "explicitly directed at expression" — the Court concluded that the enhancement provision "is aimed at conduct unprotected by the First Amendment." *Id.* at 2201. Here, of course, the state concedes that it has adopted a statute which criminalizes speech and conduct that is "disturb[ing]" to persons engaged in hunting and trapping (Opp. 18 n. 11), and hence this law suffers from similar constitutional defects to the one invalidated in *R.A.V.*, but bears no resemblance to the penalty-enhancement provision sustained in *Mitchell*.

CONCLUSION

For the foregoing reasons, as well as those set forth previously, the petition should be granted.

Respectfully submitted,

Eric R. Glitzenstein
(Counsel of Record)
Katherine A. Meyer

Meyer & Glitzenstein
1601 Connecticut Ave., N.W.
Suite 450
Washington, D.C. 20009-1035
(202) 588-5206

Attorneys for Petitioner

December 1994